Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1998

CYNTHIA A. FELLENCER,

Petitioner,

-v-

PENOBSCOT NATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the allegedly discriminatory decision of the Penobscot Nation to terminate the employment of a community health nurse who is not a tribal member can be challenged in the courts of Maine pursuant to the Maine Human Rights Act, or whether the decision constitutes an "internal tribal matter" not subject to state law?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 164 F.3d 706 (1st Cir. 1999), and is reprinted in the Appendix at 1a. The opinion of the United States District Court for the District of Maine is reported at 999 F. Supp. 120 (D. Me. 1998), and is reprinted in the Appendix at 18a. The opinions of the Penobscot County Superior Court on the Penobscot Nation's two Motions to Dismiss are not reported, but are reprinted in the Appendix at 42a. The decision of the Maine Human Rights Commission is not reported, but is reprinted in the Appendix at 55a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was filed on January 19, 1999, and this petition is timely filed within ninety days thereafter. The Court has jurisdiction to review the judgment of the United States Court of Appeals for the First Circuit pursuant to 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

Section 4552 of Title 5, Maine Revised Statutes Annotated, provides as follows (emphasis added):

> To protect the public health, safety and welfare, it is declared to be the policy of this State to keep continually in review all practices infringing on the basic human right to a life with dignity, and the causes of such practices, so

> that corrective measures may, where possible, be promptly recommended and implemented, and to prevent discrimination in employment, housing or access to public accommodations on account of race, color, sex physical or mental handicap, religion, ancestry or national origin and in employment, discrimination in the extension of credit on account of age, race, color, sex, marital status, religion, ancestry or national origin; and to prevent discrimination in education on account of sex or physical or mental handicap

Section 4553 (4) of Title 5, Maine Revised Statutes Annotated, provides in pertinent as follows (emphasis added):

> "Employer" includes any person in this State employing any number of employees, whatever the place of employment of such employees, and any person outside this State employing any number of employees whose usual place of employment is in this State....

Section 4553 (7) of Title 5, Maine Revised Statutes Annotated, provides as follows (emphasis added):

> "Person" includes one or more individuals, partnerships, associations, organizations, corporations, municipal corporations, legal representatives, trustees, trustees in bankruptcy, receivers and other legal representatives, and includes the State and all agencies thereof.

Section 6206 (1) of Title 30, Maine Revised Statutes Annotated, provides in pertinent part as follows (emphasis added):

> Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State....

Section 1721 (b) of Title 25, United States Code, provides as follows:

> It is the purpose of this Act – (3) to ratify the Maine Implementing Act, which defines the relationship between the State of Maine and the Passamaquoddy Tribe, and the Penobscot Nation . . . .

Section 1725 (d) (1) of Title 25, United States Code, provides in pertinent part as follows:

> The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, and all members thereof, and all other Indians, Indian nations, or tribes or bands of Indians in the State of Maine may sue and be sued in the courts of the State of Maine and the United States to the same extent as any other entity or person residing in the State of Maine may sue and be sued in those courts. . .
>
> .

STATEMENT OF THE CASE

The question presented by this case requires the Court to allocate sovereign powers between the Penobscot Nation and the State of Maine. Does the Penobscot Nation have a right to make the employment decision at the heart of this case as an internal tribal matter, at the expense of Cynthia Fellencer's right to be free from employment discrimination pursuant to the Maine Human Rights Act? The question is important because as federally recognized Indian tribes across the nation have become increasingly entrepreneurial, the employment protections available to non-tribal members under state law are called increasingly into dispute.

Cynthia Fellencer ("Fellencer") was hired by the Penobscot Nation ("Nation") to work as a Community Health Nurse/Diabetes Program Coordinator ("Community Health Nurse") in the Nation's Health Department. Appendix at 64a. Fellencer is not a tribal member of the Penobscot Nation. The Penobscot Nation required Fellencer, as a Community Health Nurse, to have and maintain her State of Maine license to practice as a registered nurse, and her State of Maine driver's license. Appendix at 67a. Although Fellencer

was based at the Health Department, she frequently had to travel off the reservation to perform her job duties. Appendix at 61a. Fellencer's immediate supervisor was the Medical Director of the Health Department (also a non-tribal member) who in turn reported to the Director of the Health Department (also a non-tribal member). Appendix at 61a. Hence, Fellencer was a lower level supervisor who did not report to the Penobscot Tribal Council as part of her chain-of-command. Appendix at 61a.

The Penobscot Nation Tribal Council voted on September 6, 1994, to terminate Fellencer's employment. Appendix at 68a. The Nation claimed that Fellencer was dismissed due to complaints about her performance. Appendix at 68a. However, it is undisputed that in a letter to Fellencer dated September 27, 1994, then Governor of the Penobscot Nation, Jerry Pardilla, admitted that the complaints were without merit, and that the Tribal Council had no legitimate procedural or substantive basis for seeking Fellencer's dismissal. Appendix at 69a. Fellencer's discharge became effective on September 30, 1994.

Following her termination, Fellencer filed a Charge of Discrimination with the Maine Human Rights Commission asserting that her discharge was based on race and origin discrimination in violation of the employment provisions of the Maine Human Rights Act, 5 M.R.S.A. §§ 4571 and 4572. On January 20, 1995, the Maine Human Rights Commission dismissed Fellencer's claims on the basis of lack of jurisdiction. Appendix at 55a. Fellencer subsequently filed a civil action against the Penobscot Nation in the Penobscot County Superior Court, alleging discrimination in violation of the employment provisions of the Maine Human Rights Act. The Nation moved to dismiss Fellencer's action for failure to state

a claim upon which relief could be granted, on the grounds that Fellencer's dismissal was an "internal tribal matter" under the Maine Implementing Act, 30 M.R.S.A. §6206 (1). The Penobscot County Superior Court denied the Nation's motion, relying on the decision of the Maine Supreme Judicial Court (sitting as the "Law Court") in *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me. 1993). Appendix at 42a. The Nation then filed a Motion for Reconsideration and to Dismiss for Lack of Jurisdiction, which the Penobscot County Superior Court also denied. Appendix at 51a. Fellencer then continued discovery procedures in the Superior Court.

On October 20, 1999, the Penobscot Nation filed a civil action in the United States District Court for the District of Maine, seeking declaratory judgment and a preliminary injunction to stop Fellencer from proceeding with her Superior Court action.[1] The Penobscot County Superior Court stayed the proceedings pending resolution of the District Court action. Thereafter, the Penobscot Nation and Fellencer filed cross-Motions for Summary Judgment. On March 13, 1998, the District Court entered Judgment in favor of Fellencer. Appendix at 18a. The District Court held that since Fellencer was not a tribal member, and she did exercise policy making authority in her job, the interests of the State of Maine in applying its law outweighed the interests of the Nation in having the dismissal treated as an "internal tribal matter." Based

[1] In *Akins v. Penobscot Nation*, 130 F.3d 482, 485 (1st Cir. 1997), the United States Court of Appeals declared that whether a sphere of activity constitutes an "internal tribal matter" is a federal question, since the Maine Implementing Act, 30 M.R.S.A. §§ 6201-6214, is incorporated by reference in the Maine Indian Claims Settlement Act, 25 U.S.C. §§1721-35. See 25 U.S.C. §1721 (b)(3). Hence, the District Court exerted subject matter jurisdiction pursuant to 28 U.S.C. §1331 (federal question), despite Fellencer's request that the District Court abstain in deference to the State Court system. Appendix at 40a.

on the District Court's opinion, the Penobscot County Superior Court lifted its stay of the proceedings, and allowed discovery to continue.

The Penobscot Nation then appealed from the District Court's decision to the United States Court of Appeals for the First Circuit. On January 19, 1999, the United States Court of Appeals for the First Circuit reversed the Judgment of the District Court, and remanded the case for entry of Judgment in favor of the Penobscot Nation. The Court of Appeals reasoned that the State of Maine's interests in protecting the employment rights of one non-tribal individual did not outweigh the Nation's interests in treating Fellencer's termination as an "internal tribal matter." Fellencer now timely petitions this Court for review.

REASONS FOR GRANTING THE WRIT

I. THE REASONING OF THE COURT OF APPEALS IS SQUARELY AT ODDS WITH THE MAINE SUPREME JUDICIAL COURT'S AVAILABLE PRECEDENT.

The central issue in this case is how to properly interpret the "internal tribal matters" provision of the Maine Implementing Act, 30 M.R.S.A. §6206 (1), as incorporated by reference in the Maine Indian Claims Settlement Act, 25 U.S.C. §1721 (b) (3). The Implementing Act provides that the Penobscot Nation is subject to the liabilities of a municipality under Maine law, except that "internal tribal matters, including membership in the respective tribe or nation, the right to reside with the respective Indian territories, tribal

organization, tribal government, tribal elections and the use or disposition of settlement income shall not be subject to regulation by the State." 30 M.R.S.A. §6206 (1). Maine's court of last resort, the Maine Supreme Judicial Court, sitting as the Law Court, has said that the "internal tribal matters" provision must be interpreted narrowly. The United States Court of Appeals for the First Circuit held that the provision can be interpreted expansively. Thus, the decisions of the First Circuit and of the Law Court have created a conflict that should be resolved by this Court.

The Law Court's interpretation of the "internal tribal matters" provision of the Maine Implementing Act is set forth in the seminal case of *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me.) *appeal dismissed*, 464 U.S. 923 (1983). In *Stilphen*, the Law Court considered whether the operation of tribal bingo games was an "internal tribal matter" which escaped State regulation. The Law Court concluded it was not, explaining that the phrase "internal tribal matter" is "not a legal term of art." *Id.* at 489. Rather, the phrase has a meaning assigned by the terms used in the statute to qualify the exception. *Id.* The terms include "membership in the respective tribal nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income." 30 M.R.S.A. §6206 (1). According to the Law Court:

> By the very nature of the matters listed, action by the Nation *directly* affecting them would not tend to bring the Nation into conflict with state laws of general application. By the familiar *ejusdem generis* rule, a general term followed by a list of illustrations is ordinarily

> assumed to embrace only concepts similar to those illustrations.

Penobscot Nation v. Stilphen, 461 A.2d at 489. Under this formulation, tribal activities that are merely "related to" the terms on the list are not entitled to protection from State regulation. *Id.* Hence, the Law Court rejected the argument that bingo games were "internal tribal matters" because revenue from the games helped finance tribal government. *Id.*; *see also Houlton Band of Maliseet Indians v. Boyce*, 688 A.2d 908, 911 (Me. 1997) (incidental impact on tribal election dispute does not run afoul of internal tribal matters). Indeed, the Law Court recognized that the "related to" argument would virtually nullify State jurisdiction. *See Id.* Thus, under the interpretive guidance established by the Law Court in *Stilphen*, the test of whether a tribal activity escapes State regulation as an "internal tribal matter" depends on whether the tribal activity at stake is "fundamentally" akin to the terms in the list. *Id.* at 489.

The United States Court of Appeals for the First Circuit has taken a completely opposite approach to interpreting the "internal tribal matters" provision of the Maine Implementing Act. Eschewing the Law Court's reliance on the statutory construction doctrine of *ejusdem generis*, the First Circuit has taken the position that the list of exemplars following "internal tribal matters" is not exclusive or exhaustive, and in fact provides little guidance. Appendix at 7a. Rather than following the Law Court's approach, the First Circuit has articulated "five considerations" relevant to determining whether the dispute at stake is an "internal tribal matter." Appendix at 8a. The First Circuit's non-textual approach to interpreting the "internal tribal matters" provision eviscerates the statutory-based approach established by

the Maine Law Court in *Penobscot Nation v. Stilphen*, and creates a fundamental conflict on an important federal question.

This Court should grant the writ not only because of the conflict between Maine's court of last resort and the United States Court of Appeals for the First Circuit, but also because of the unique procedural posture of the case. By directing judgment in favor of the Penobscot Nation's complaint for an injunction bringing a halt to Fellencer's Superior Court action, the First Circuit deprived Fellencer of the opportunity to have the Superior Court and the Law Court develop the approach the Law Court adopted in *Penobscot Nation v. Stilphen*.[2] Now that the procedural device has been established for essentially "removing" actions against the Penobscot Nation pursuant to the Maine Human Rights Act from Superior Court to federal District Court, the Penobscot Nation can effectively prevent the Law Court from having an opportunity to rule on future cases. In view of this procedural history, it is particularly important for this Court to resolve the fundamental conflict between the Law Court and the First Circuit. Accordingly Fellencer respectfully requests this Court to grant her Writ.

[2] The District Court exerted jurisdiction despite Fellencer's argument that it should abstain in favor of the Superior Court. Appendix at 40a.

II. THE ALLOCATION OF SOVEREIGN POWERS BETWEEN THE PENOBSCOT NATION AND THE STATE OF MAINE HAS NATIONAL IMPLICATIONS AND DESERVES THIS COURT'S REVIEW.

The dispute between Fellencer and the Penobscot Nation has importance on two levels, both of which merits this Court's review. First, this action stems from a clash between a state law of central importance to the State of Maine, and the sovereign powers of a federally recognized Indian tribe residing within the State of Maine. According to the policy statement of the Maine Human Rights Act:

> [I]t is declared to be the policy of this State to keep continually in review all practices infringing on the basic human right to a life with dignity, and the causes of such practices, so that corrective measures may, where possible, be promptly recommended and implemented, and to prevent discrimination in employment . . .on account of race, color, sex, physical or mental disability, religion, ancestory, or national origin.

5 M.R.S.A. §4552. The "fair employment provisions of the MHRA specifically declare as the policy of the State of Maine that every individual has the civil right to secure employment without discrimination. . . ." *Maine Human Rights Comm'n v. Canadian Pacific Ltd.*, 458 A.2d 1225, 1230 (Me. 1983). The Act was "meant to have very broad coverage." *Maine Human Rights Comm'n v. Local 1361, United Paper Workers Int'l Union,* 383 A.2d 369, 373 (Me. 1978). The First Circuit erred because it failed to adequately consider the

interest of the State of Maine in having the Maine Human Rights Act applied uniformly to all employers in the State. As a result, this Court should grant the writ in order to resolve the clash of a fundamental values at stake within the State's borders.

Second, this case has national significance that extends well beyond the borders of Maine. Although the question of whether tribal employment decisions constitute "internal tribal matters" arises under the Maine Implementing Act (as incorporated in the Maine Indian Claims Settlement Act), the Implementing Act was written against the backdrop of federal Indian common law.[3] Federal cases examining the inherent sovereignty of Indian tribes to control employment decisions are mixed. Several cases exist to support the proposition that Indian tribes are not subject to a variety of *federal* employment discrimination statutes. See, e.g. *Wardell v. Ute Indian Tribe*, 623 F.2d 670, 673 (10th Cir. 1980), and *Stroud v. Seminole Tribe of Florida*, 606 F. Supp. 678, 680 (S. D. Fla. 1985). However, few cases have directly addressed application of *state* anti-discrimination statutes.

For instance, in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980), this Court declared that a state's regulatory interest is minimal (and the federal interest encouraging tribal self-government strongest) where on-reservation conduct involving only Indians is at issue. However, in *Montana v. United States*, 450 U. S. 544, 565 (1981), the Court noted that in matters involving the relations

[3] Moreover, Congress has enacted several other settlement acts, many of them addressing the applicability of state law. See, e.g., 25 U.S.C.§1708 (Rhode Island; 25 U.S.C. §1746 (Florida); 25 U.S.C. §1755 (Connecticut); and 25 U.S.C. §1771g (Massachusetts).

between an Indian tribe and non-members of the tribe, there is an implicit divestiture of sovereignty. Furthermore, in *Strate v. A-1 Contractors*, 520 U. S. 438, 117 S. Ct. 1404, 1409; 137 L. Ed.2d 661 (1997), this Court reaffirmed *Montana's* holding that, in general, the inherent sovereign powers of a tribe do not extend to the activities of non-members of the tribe. The present case isolates the specific issue of whether tribal employment decisions should be considered within the inherent sovereignty of a federally recognized Indian tribe, or whether such employment decisions should be open to challenge in state court on the basis of a state's anti-discrimination laws. Resolution of this important and timely issue will have national significance, and merits this Court's review.

CONCLUSION

For all of the foregoing reasons, Cynthia A. Fellencer respectfully requests this Court to grant her Petition for a Writ of Certiorari.

Dated in Portland, Maine this 16 day of April, 1999.

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(Any footnotes trail end each document)

PENOBSCOT NATION, Appellant, v. CYNTHIA A. FELLENCER, Appellee.

No. 98-1326

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

January 19, 1999, Decided

COUNSEL: Kaighn Smith, Jr., with whom Gregory W. Sample was on brief for appellant.

Michael A. Duddy for appellee.

JUDGES: Before Lipez, Circuit Judge, Coffin and Campbell, Senior Circuit Judges.

OPINIONBY: LIPEZ

OPINION: LIPEZ, Circuit Judge. This case requires us to revisit and further define the allocation of sovereign powers between the Penobscot Nation (the Nation) and the State of Maine. The question before us is whether the decision of the Penobscot Nation Tribal Council to terminate the employment of a community health nurse constitutes an "internal tribal matter" within the meaning of the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721 -1735. The district court held that it does not. We disagree. That employment termination decision is an "internal tribal matter" and, as such, cannot be challenged in the courts of

Maine pursuant to the Maine Human Rights Act (MHRA), Me. Rev. Stat. Ann. tit. 5, § 4551 et seq.

I.

The undisputed material facts are recounted thoroughly in the district court's opinion. See Penobscot Nation v. Fellencer, 999 F. Supp. 120 (D. Me. 1998). We provide only a brief sketch to set the stage. Cynthia A. Fellencer was employed by the Penobscot Nation as a Community Health Nurse/Diabetes Program Coordinator (community nurse) from December 1992 until September 1994, when the Penobscot Nation Tribal Council voted to terminate her employment. Fellencer, who is a non-Indian, filed a charge of discrimination with the Maine Human Rights Commission (MHRC) alleging that she had been discharged due to her race and national origin. The MHRC dismissed her complaint for lack of jurisdiction, finding that adjudication of the claim "would create a serious potential of State interference with the internal affairs of the tribal government, a result clearly not intended by the Maine Indian Settlement Act." MHRC Administrative Dismissal, Case No. E94-0730 (Jan. 30, 1995).

Fellencer subsequently filed suit in the Maine Superior Court against the Penobscot Nation, claiming that the Nation had terminated her employment (1) without due process and (2) "due to her race and/or national origin in violation of the Maine Human Rights Act." She claims that subsequent to her termination the community nurse position was posted with an express preference for Indian applicants. The Nation filed a motion to dismiss, which was denied.

On October 20, 1997, the Nation filed the instant action in the federal district court seeking a preliminary injunction to stay

the state court proceeding. Cross motions for summary judgment were filed. On March 13, 1998, the district court denied the Nation's request for a preliminary injunction and entered judgment in favor of Fellencer, thereby permitting the state court case to proceed. The district court's denial of the preliminary injunction can be reversed where there has been a "misapplication of the law to particular facts" or an "application of the wrong legal standard." See Planned Parenthood League of Mass. v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1981); see also Narragansett Indian Tribe v. Narragansett Elec. Co., 89 F.3d 908, 912 (1st Cir. 1996) (reversing district court's denial of preliminary injunction). We conclude that there was a misapplication of the law.

II.

The backdrop to the state and federal court proceedings is some familiar history. In the early 1970s, the Nation (in concert with the Passamaquoddy Tribe and others) filed suit claiming nearly two-thirds of Maine's land mass as their ancestral homelands. See Passamaquoddy Tribe v. Maine, 75 F.3d 784, 787 (1st Cir. 1996) (citing Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975)). After federal authorities interceded, the parties negotiated a compromise which was approved by Maine, the Penobscots, the other Indian parties, and Congress. The compromise is memorialized in two statutes: the Maine Implementing Act, Me. Rev. Stat. Ann. tit. 30, §§ 6201-14 (the Implementing Act), and the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-35 (the Settlement Act). The settlement represented a partial victory for the Nation and Maine: the Nation obtained federal recognition as an Indian tribe and received almost one half of $ 81.5 million appropriated under the Settlement Act (see 25 U.S.C. § 1733)

and, in exchange, the Nation's claims against Maine were extinguished. Further, while the Nation's right to self-government was preserved to a limited extent, Maine was permitted to extend its jurisdiction over the Nation to a greater degree than most states exercise over other Indian tribes. See Akins v. Penobscot Nation, 130 F.3d 482, 484-85 (1st Cir. 1997).

As a result of the settlement, the relationship between the Penobscot Nation and Maine is governed primarily by the Implementing Act (state) and the Settlement Act (federal). The Implementing Act provides as follows:

> The Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.

Me. Rev. Stat. Ann. tit. 30, § 6206(1) (emphasis added). We have previously recognized that "as to state law, the Penobscot Nation and Maine expressly agreed that, with very

limited exceptions, the Nation is subject to the laws of Maine." Akins, 130 F.3d at 484-85.

The Implementing Act was incorporated by reference into the Settlement Act, 25 U.S.C. §§ 1721-1735. See 25 U.S.C. § 1721(b)(3). In ratifying the Implementing Act, Congress sought to balance Maine's interest in continuing to exercise jurisdiction over the Nation's land and members (which it had done without interference for almost two centuries), see Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061, 1064-65 (1st Cir. 1979), with the Nation's "independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing." S. Rep. No. 96-957, at 29 (1980) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978)). Both the House and Senate sought to assuage the Nation's fears that the settlement undermined its sovereignty:

> While the settlement represents a compromise in which state authority is extended over Indian territory to the extent provided in the Maine Implementing Act, ... the settlement provides that henceforth the tribes will be free from state interference in the exercise of their internal affairs. Thus, rather than destroying the sovereignty of the tribes, by recognizing their power to control their internal affairs ... the settlement strengthens the sovereignty of the Maine Tribes.

S. Rep. No. 96-957, at 14; H.R. Rep. No. 96-1353, at 14-15, reprinted in 1980 U.S.C.C.A.N. at 3790.

III.

As the language of the Implementing Act and the federal legislative history make clear, the critical phrase to analyze in determining the scope of tribal sovereignty is "internal tribal matters." When the Nation acts on "internal tribal matters," its actions are not subject to regulation by the state. Me. Rev. Stat. Ann. tit. 30, § 6206(1). Because the phrase "internal tribal matters" was adopted by the federal Settlement Act, the meaning of that phrase raises a question of federal law. See Akins, 130 F.3d at 485; see also Bottomly, 599 F.2d at 1066 ("until Congress acts, the tribes retain their [] sovereign powers").

Before we examine the language of the Implementing Act, we must acknowledge some general principles that inform our analysis of the statutory language. First, Congress' authority to legislate over Indian affairs is plenary and only Congress can abrogate or limit an Indian tribe's sovereignty. See U.S. CONST., art. I, § 8, cl. 3; Morton v. Mancari, 417 U.S. 535, 551-53, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974) (discussing the plenary power of Congress to deal with special problems of Indians); see also F. Cohen, Handbook of Federal Indian Law 231 (1982 ed.) ("Neither the passage of time nor apparent assimilation of the Indians can be interpreted as diminishing or abandoning a tribe's status as a self governing entity."). Second, special rules of statutory construction obligate us to construe "acts diminishing the sovereign rights of Indian tribes ... strictly," Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 702 (1st Cir. 1994), "with ambiguous provisions interpreted to the [Indians'] benefit," County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226, 247, 84 L. Ed. 2d 169, 105 S. Ct. 1245 (1985). These special canons of construction are employed "in order to comport with the[] traditional notions of sovereignty and with the federal policy of encouraging tribal independence,"

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44, 65 L. Ed. 2d 665, 100 S. Ct. 2578 (1980), and are "rooted in the unique trust relationship between the United States and the Indians," County of Oneida, 470 U.S. at 247.

A. The Language of the Statute

The Implementing Act preserves the Nation's sovereignty with respect to

> internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income ....

Me. Rev. Stat. Ann. tit. 30, § 6206(1). While the list of exemplars following "internal tribal matters" informs the meaning of that term, the list is not exclusive or exhaustive. In fact, we declared in Akins that the exemplars "provide limited guidance." Akins, 130 F.3d at 486. We also recognized in Akins that the fact "that a tribe attempts to govern a matter does not render it an internal tribal matter." Id.

B. The Akins Precedent

Akins was our first occasion for addressing the allocation of sovereign powers between the Nation and the State of Maine pursuant to the Implementing Act and the Settlement Act. The Nation had adopted a policy allowing only enrolled members of the tribe who lived on the reservation to be eligible for timber permits to harvest timber on tribal lands.

See Akins, 130 F.3d at 483. Akins, an enrolled tribal member who had moved off the reservation, lost his timber permit as a result of the change in policy. Id. at 483-84. Akins sued in federal court, claiming that the Nation had violated his rights to due process and equal protection, and that the Nation had violated his right to be free from bills of attainder. Id. at 484. We held that Akins' claims involved an "internal tribal matter" and were subject to the exclusive jurisdiction of the tribal courts. Id. at 490.

We identified five considerations in Akins that were persuasive in characterizing the grant of timber rights as an "internal tribal matter." These considerations were: (1) the disputed policy regulated only tribal members; (2) the policy related to lands acquired by the Nation with federal funds received for that purpose, and the lands were considered "Penobscot Indian Territory"; (3) the policy affected the Nation's ability to regulate its natural resources; (4) at least on its face, the policy did not implicate or impair the interest of the State of Maine; and (5) the recognition that the timber harvesting policy involved an "internal tribal matter" was consistent with prior legal understandings. Akins, 130 F.3d at 486-87. We did not offer these considerations as an essential test for determining which tribal actions constitute "internal tribal matters," see id. at 487 (noting that "generalizations in this subject [of tribal authority] have become ... treacherous" and that "we tread cautiously and write narrowly"), and we do not offer them now for that purpose. Instead, we use the Akins considerations as one source of guidance in resolving this case. And, in the spirit of Akins, we consider another pertinent factor, the nature of the position involved in this case.

Evaluating all of these considerations, with particular emphasis on the interest of the State of Maine, prior legal understandings, and the nature of Fellencer's position, we conclude that the decision of the Nation to terminate Fellencer's employment was an "internal tribal matter."

C. The Akins Considerations

1. Within the Tribe

Although Fellencer, unlike Akins, is not a member of the Nation, and hence the effect of the decision at issue is not limited to tribal members, the decision to terminate Fellencer as the community health nurse affects many tribal members but only one non-tribal member (Fellencer). This limited impact beyond the Nation distinguishes this case from Penobscot Nation v. Stilphen, 461 A.2d 478 (Me. 1983), wherein the Maine Supreme Judicial Court held that a "beano" game, a tribal enterprise designed to involve many non-tribal members, did not become an "internal tribal matter" simply because an Indian tribe administered it, or because an Indian tribe funded government services with the beano game's profits. See id. at 486. Holding that the public gambling events were "related to tribal self-government only because of the use to which its profits are put," the Stilphen Court held that the tribe had "no inherent right to 'market an exemption from state taxation'" to the public. Id. (quoting Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980)). The "beano" games in Stilphen were designed to "draw many hundreds of players to the Penobscot reservation from all over Maine and beyond." Stilphen 461 A.2d at 480. Here the employment decision has its immediate effect on only one non-tribal member. n1

2 & 3. Land and Natural Resources

The second and third considerations in Akins related to the commercial use of tribal lands ("the very land that defines the territory of the Nation," Akins, 130 F.3d at 487), and the "growth, health, and reaping" of the tribe's natural resources. Id. Although this case does not involve tribal land and natural resources, it does involve the Nation's human resources and its judgment that a different community health nurse will better serve the health of tribal members. See Montana v. United States, 450 U.S. 544, 566, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981) (recognizing that Indian tribes may "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the . . . health or welfare of the tribe").

4. Interest of Maine

As a generality, Maine has a strong interest in protecting all employees against discrimination through its Human Rights Act. See Me. Rev. Stat. Ann. tit. 5, § 4552; see also Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d 369, 373 (Me. 1978)(stating that the MHRA "was meant to have very broad coverage"). In this case, however, the State is not attempting to apply its laws to the Nation's employment decision. To the contrary, the Maine Attorney General ruled long before this case that "the employment decisions of the Penobscot Nation, when acting in its capacity as a tribal governmental employer, are not subject to regulation by the state[.]" Maine Attorney General Opinion No. 84-22 (July 25, 1984). n2 Thus, while the United States intervened in this case to argue that an employment decision by the Nation is an "internal tribal

matter" and therefore not subject to the MHRA, Maine did not intervene to argue to the contrary. In Akins we found this posture significant. Even though Akins alleged violations of Maine law, we noted that there was "not a dispute between Maine and the Nation over the attempted enforcement of Maine's laws." Akins, 130 F.3d at 487 (emphasis added). The situation here is even more favorable to the Nation. The state disavows the very "state interest" that Fellencer seeks to invoke in support of her private cause of action.

5. Prior Legal Understandings

Prior legal understandings strongly support the Nation's claim of exemption from challenge in state court to its employment termination decision. In the employment discrimination context, Congress exempted Indian tribes from Title VII's definition of "employer" in the original passage of the Civil Rights Act of 1964. 42 U.S.C. § 2000e(b) ("The term 'employer' means a person engaged in an industry affecting commerce . . . . Such term does not include . . . an Indian tribe"). n3 The Supreme Court has characterized this exemption as "Congress' recognition of the longstanding federal policy of providing a unique legal status to the Indians in matters of tribal employment," and it characterized Congressional intent as a "policy of furthering Indian self-government." Morton v. Mancari, 417 U.S. 535, 548, 551, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974) (emphasis added). n4

General federal Indian civil rights law, outside the employment discrimination context, further bolsters the conclusion that Fellencer's claim involves an "internal tribal matter." Even though Indian tribes were exempted from Title VII coverage, Congress subsequently enacted the Indian Civil

Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-41, made applicable to the Penobscot Nation through the Settlement Act, 25 U.S.C. § 1725(h). See Akins, 130 F.3d at 486. Under the ICRA, "no Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(8).

As fundamental as federal court jurisdiction has been to the protection of the civil rights enumerated in section 1302(8), the Supreme Court held in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978) that gender discrimination claims against tribes were cognizable only in Indian tribunals. n5 In the Supreme Court's view, Congress did not intend to abrogate Indian tribal sovereignty to the extent that Indian tribes could be forced to defend against such civil rights claims in an external (non-tribal) forum: "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." Id. The Supreme Court explained that exclusive jurisdiction has been reposed in the Indian tribunals because subjecting such claims to federal court jurisdiction "plainly would be at odds with the congressional goal of protecting tribal self-government." Id. at 64. n6

These prior legal understandings (both the Title VII exemption and the ICRA's grant of exclusive jurisdiction to tribal courts) are particularly important because they inform the intent of Congress in the adoption of the Settlement Act. We "have long presumed that Congress acts against the background of prior law." Akins, 130 F.3d at 489 (citing Kolster v. INS, 101 F.3d 785, 787-88 (1st Cir. 1996)); see

also Passamaquoddy Tribe, 75 F.3d at 789 ("To [give effect to the legislative will] a court must take into account the tacit assumptions that underlie a legislative enactment, including not only general policies but also preexisting statutory provisions."). The statutory provisions in Title VII and the ICRA reflect Congress' understanding prior to the adoption of the Settlement Act that employment discrimination claims against Indian tribes implicate "unique" considerations, see Morton v. Mancari, 417 U.S. at 548, and that such claims should be heard in Indian courts. See Santa Clara Pueblo, 436 U.S. at 64-65.

Indeed, the Senate Report on the Settlement Act explicitly cited with approval to Santa Clara Pueblo, 436 U.S. 49, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978). See S. Rep. No. 96-957, at 29 (1980). Although we have refused to read into this reference an incorporation of "all prior Indian law" because that "would be inconsistent with the unique nature of the Maine settlement," Akins, 130 F.3d at 489, we also recognized that Congress "explicitly made existing general federal Indian law applicable to the Penobscot Nation in the Settlement Act." Id. That body of law includes Congressional enactments excluding Indian tribes from Title VII coverage and limiting civil rights claims against the tribes to tribal forums. See Santa Clara Pueblo, 436 U.S. at 65-66.

The Senate Report on the Settlement Act also noted that the Act strengthened the Nation's sovereignty "by recognizing [the Penobscot's] power to control their internal affairs and by withdrawing the power which Maine previously claimed to interfere in such matters[.]" S. Rep. 96-957, at 14. The Report predicates the Nation's right to be free from state interference on the Nation's "inherent sovereignty" as recognized in Bottomly, 599 F.2d 1061, and State v. Dana,

404 A.2d 551 (Me. 1979). Both Bottomly and Dana drew on federal Indian common law in recognizing the inherent sovereignty of the Penobscot and Passamaquoddy tribes. See Bottomly, 599 F.2d at 1066; Dana, 404 A.2d at 560-61. The Report states that "in keeping with" the sovereignty recognized in Bottomly and Dana, it was Congress' intent to guarantee that the Nation "[would] be free from state interference in the exercise of [its] internal affairs." S. Rep. 96-957 at 14. By characterizing its recognition of the Nation's sovereignty as "in keeping with" Bottomly and Dana, Congress signaled its intent that federal Indian common law give meaning to the terms of the settlement. The Senate Report continues by listing important sovereignty rights retained by the Nation, including "the establishment of tribal courts ... with powers similar to those exercised by Indian courts in other parts of the country." Id. at 15. These powers included hearing employment discrimination claims filed against the tribes.

In summary, these prior legal understandings provide strong support for classifying a claim of national origin discrimination based on the termination of Fellencer's employment as an "internal tribal matter."

D. The Nature of the Position at Issue

Apart from the statutory language, judicial precedent, legislative history and federal Indian common law, the Nation's employment of a community health nurse has particular "internal tribal matter" implications because of the statutory origins of the position. The community nurse position from which Fellencer was dismissed is funded by the Indian Self-Determination and Education Assistance Act of 1975 (ISDA), 25 U.S.C. § 450 et seq. Congress therein

declared its policy to "respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of . . . Federal services to Indian communities." 25 U.S.C. § 450a(a); see also S. Rep. No. 102-392, at 7 (1992), reprinted in 1992 U.S.C.C.A.N. at 3949 (1992 amendments to Indian Health Care Improvement Act)("health care provided by people of one's own culture is the most appropriate, and results in better utilization of health care services"). Believing that the administration of such services by Indians was "crucial to the realization of self-government," 25 U.S.C. § 450(a)(1), Congress included an employment preference for Indians in the legislation. 25 U.S.C. § 450e(b) (requiring that "preferences and opportunities for training and employment . . . shall be given to Indians").

This employment preference for Indians distinguishes the Nation's community nurse position from any position in a regular municipal government. Cf. Implementing Act, Me. Rev. Stat. Ann. tit. 30, § 6204 (subjecting Nation generally to same state jurisdiction as state exercises over municipalities). Clearly, Maine municipalities cannot employ similar preferences. The uniqueness of the federal employment preference counsels against the application of Maine law in this employment discrimination context. In light of the Supreme Court's description of such preferences in Morton v. Mancari, 417 U.S. at 553 (1974), as furthering "self-government," and in light of the other considerations set forth herein, we hold that the decision of the Nation to terminate the employment of a community health nurse was an "internal tribal matter" within the meaning of the Settlement Act, and hence the Nation cannot be subjected to state court jurisdiction for the adjudication of an employment

discrimination claim pursuant to the Maine Human Rights Act.

The judgment of the district court is reversed; the case is remanded for the entry of judgment in favor of the Nation and the issuance of an injunction if it is deemed necessary.

Footnotes

n1 We recognize that a decision exempting the Nation from coverage under the MHRA in this case may potentially affect other non-tribal members; i.e., non-members may be discouraged from applying for employment with the Nation. This broader public impact implicates the State of Maine's responsibility for protecting its citizens from impermissible employment discrimination. We address this issue in our discussion of the interest of the State of Maine.

n2 This position was initially adopted by the MHRC in November 1982 in Ranco v. The Penobscot Nation (case No. E81-0020), and has been the undisturbed interpretation of the Maine Human Rights Commission since that time.

n3 The district court incorrectly expanded on the holding in Houlton Band of Maliseet Indians v. Maine Human Rights Commission, 960 F. Supp. 449 (D. Me. 1997) in determining that the Penobscot Nation is not exempted from Title VII's coverage. The court in Houlton Band was opining on whether the Title VII exemption operated to preempt state law with respect to the Maliseet Indians, an outcome which was clearly not intended by the Settlement Act. See id. at 455; see also 25 U.S.C. § 1725(h). However, as the Houlton Band court recognized, the "internal tribal matter" exemption applies to

the Penobscot Nation and not to the Maliseet Indians. Houlton Band, 960 F. Supp. at 454. Our decision is based on the "internal tribal matter" exemption and not on preemption per se.

n4 Two circuits have extended this exemption to bar claims against Indian tribes based on the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34, even though no similar express exemption is contained in the ADEA. These courts premised the implied exemption from federal court jurisdiction over age-based discrimination claims on the Indian tribes' right to self-government. See EEOC v. Fond Du Lac Heavy Equip. and Const. Co., 986 F.2d 246, 249 (8th Cir. 1993); EEOC v. Cherokee Nation, 871 F.2d 937, 938 (10th Cir. 1989).

n5 In Santa Clara Pueblo a female member of the tribe brought an action claiming the tribe's policies violated the ICRA's equal protection clause, 25 U.S.C. § 1302(8). Specifically, the plaintiff asserted that a tribal ordinance which denied tribal membership to the children of female members who marry outside the tribe but not to the children of similarly situated men impermissibly discriminated on the basis of gender. See Santa Clara Pueblo, 436 U.S. at 52-53.

n6 There is one exception, not applicable in this case: Congress has authorized federal court jurisdiction only to hear habeas corpus petitions. See 25 U.S.C. § 1303; see also Santa Clara Pueblo, 436 U.S. at 66-67.

PENOBSCOT NATION, Plaintiff v. CYNTHIA A. FELLENCER, Defendant

Civ. No. 97-231-B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

March 13, 1998, Decided
March 13, 1998, Filed

COUNSEL: For plaintiff: KAIGHN SMITH JR., Esq., DRUMMOND, WOODSUM & MACMAHON, PORTLAND, ME.

For defendant: MICHAEL A. DUDDY, Esq., KOZAK, GAYER & BRODEK, P.A., BANGOR, ME.

For amicus curiae: ANN C. JULIANO, Esq., U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC.

JUDGES: MORTON A. BRODY, United States District Judge.

OPINIONBY: MORTON A. BRODY

OPINION: ORDER AND MEMORANDUM OF DECISION

BRODY, District Judge

Plaintiff, Penobscot Nation ("the Nation" or "the Tribe"), seeks a permanent injunction enjoining Defendant, Cynthia A. Fellencer, a former employee of Plaintiff, from pursuing claims arising under the Maine Human Rights Act, 5 M.R.S.A. § 4551 et seq. ("MHRA"), against it in the matter of Fellencer v. Penobscot Indian Nation, No. CV-95-275 (Maine Superior Court, Penobscot County, filed Aug. 14, 1995), and a declaration that Defendant's claims under the MHRA violate Plaintiff's right to govern its internal affairs as established by the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. § 1721 et seq. ("Settlement Act").

Plaintiff and Defendant have filed cross-motions for summary judgment and the Justice Department, on behalf of the United States, has filed an Amicus Curiae Memorandum in support of Plaintiff's motion. For the reasons discussed more fully below, the Court holds that the Nation's employment of Defendant is not an "internal tribal matter" and is, therefore, subject to state law and the requirements of the MHRA. Thus, Defendant's motion is GRANTED and Plaintiff's motion is DENIED.

I. SUMMARY JUDGMENT

Summary judgment is appropriate in the absence of a genuine issue as to any material fact and when the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is genuine for these purposes if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A material fact is one that has "the potential to affect the outcome of the suit under applicable law." Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). For the

purposes of summary judgment the Court views the record in the light most favorable to the nonmoving party. See McCarthy v. Northwest Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995).

II. BACKGROUND

The relevant facts of this case are largely undisputed. Defendant, who is not a member of the Nation, was hired by Plaintiff to work in the Penobscot Nation Health Department as a Community Health Nurse/Diabetes Program Coordinator in or around December, 1992, or January, 1993. Defendant was paid out of governmental funds of the Nation and her duties included treating sick and elderly members of the Nation, filing reports relating to communicable diseases with Indian Health Services, coordinating a Diabetes Interdisciplinary Team, and serving as an AIDS Prevention Coordinator. Def.'s Ex. 2; Pl.'s Statement of Material Facts ("SOF") P 3. She worked in this capacity until September, 1994, when the Penobscot Nation Tribal Council ("Tribal Council") voted to terminate her employment. Pl.'s SOF P 4. According to Plaintiff, Fellencer was fired after the Tribal Council received complaints about mistreatment of tribal members. Id. However, in a letter addressed to Fellencer dated September 27, 1994, the Governor of the Nation, Jerry Pardilla, admitted that the Tribal Council "over-stepped its authority," provided Fellencer "no opportunity . . . to respond" to charges against her, and "subverted the Personnel Policies and sought to force your resignation." Def.'s Ex. 4. Governor Pardilla wrote that the Council fired Fellencer for "political reasons" and admitted that "there is no existent procedural basis for requesting your resignation, and; further, it is not based on an objective evaluation of your work performance." Id.

In October, 1994, Defendant filed an administrative complaint against Plaintiff with the Office of Federal Contract Compliance Programs ("OFCCP"), asserting that the Nation discharged her for discriminatory reasons in violation of a federal contract between the Penobscot Nation and the federal Indian Health Services agency that provided funding for her position at the Penobscot Nation Health Department. Fellencer Aff. P 12. The OFCCP attempted to conduct an investigation of Defendant's allegations but was rebuffed by the Nation which contended OFCCP lacked jurisdiction over the matter. Def.'s Ex. 4.

On November 2, 1994, Defendant filed a charge of discrimination with the Maine Human Rights Commission ("MHRC") and the U.S. Equal Employment Opportunity Commission ("EEOC") alleging that she was discharged on the basis of her race and national origin. Pl.'s Ex. 6. On January 30, 1995, the MHRC informed Defendant that her charge had been dismissed because the MHRC lacked jurisdiction over matters involving employment by the tribal government. Pl.'s Ex. 1. The MHRC relied entirely on a 1984 opinion of the Maine Attorney General which concluded that under the Settlement Act employment decisions of the Nation are "internal tribal matters," and therefore not subject to regulation by the State of Maine. Pl.'s Ex. 1.

Defendant then petitioned the Penobscot County Superior Court for review of the MHRC's decision. Pl.'s Ex. 8. The Superior Court dismissed Defendant's action on the ground that the MHRC's decision was not a final judgment warranting appellate review, but, rather, an administrative decision which did not affect her substantive rights. Pl.'s Ex. 9. The court indicated, however, that Defendant was free to bring a direct action against the Nation. Id. Defendant then

filed a complaint against the Nation in Superior Court on August 14, 1995, alleging violation of the MHRA and breach of contract. Pl.'s Ex. 10.

The Nation moved to dismiss Defendant's claim on the ground that the MHRA does not apply to the Penobscots. Superior Court Judge Donald H. Marden, in a nine-page opinion, denied the Nation's motion. Fellencer v. Penobscot Indian Nation, No. CV-95-275 (Maine Superior Court, Penobscot County, July 30, 1996) (order denying motion to dismiss). Relying on Penobscot Nation v. Stilphen, 461 A.2d 478, 490 (Me. 1983), in which the Maine Law Court reasoned that "internal tribal matters" refers to those matters historically and culturally significant or unique to the Nation, Judge Marden declined to rule as a matter of law that all employment decisions of the Nation invoke areas of particular cultural importance. Determining the applicability of the MHRA to the Nation in this case, according to Judge Marden, requires an evaluation of "the cultural, historical and/or societal role the Community Health Nurse plays in the Penobscot Nation," which is more appropriately conducted at trial. Fellencer v. Penobscot Indian Nation, No. CV-95-275, slip. op. at 5. Following a series of discovery disputes, the Nation brought suit in this Court seeking declaratory and injunctive relief and the Superior Court granted a stay of the state proceedings until disposition of this case.

III. DISCUSSION

A.

The primary issue of this case is whether the Nation's employment of a Community Health Nurse is an "internal tribal matter" for the purposes of the Settlement Act.

> While defining what constitutes an internal matter controlled by Indian tribes is hardly novel in Native American law, it is novel in this context. The relations between Maine and the Penobscot Nation are not governed by all of the usual laws governing such relationships, but by two unique laws, one Maine and one federal, approving a settlement.

Akins v. Penobscot Nation, 130 F.3d 482, 483 (1st Cir. 1997). The Settlement Act established a unique legal relationship between the Maine tribes and the State of Maine and subjected the Penobscot Nation and its members "to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act . . . ." 25 U.S.C. § 1725(b)(1). n1 The Maine Implementing Act, 30 M.R.S.A. §§ 6201-6214 ("Implementing Act"), which was "approved, ratified, and confirmed" by Congress in the Settlement Act, 25 U.S.C. § 1725(b)(1), provides:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

30 M.R.S.A. § 6204. The Implementing Act clarifies the powers of the Penobscot Nation as those of a municipality, with an exception for "internal tribal matters."

> Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that all internal tribal matters, including membership within the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.

30 M.R.S.A. § 6206(1) (emphasis added). Therefore, unless the employment of Fellencer was an "internal tribal matter," Plaintiff, like any other municipality in the State of Maine, is subject to the requirements of the MHRA.

B.

Citing Congress' general plenary power over Indian tribes and the congressional role in the adoption of the Settlement Act and the Implementing Act, Plaintiff first argues that the interpretation of "internal tribal matter" is governed by federal law and that its right to be free from regulation in internal tribal matters is a federal right. Plaintiff then argues that the language of the Implementing Act, First Circuit precedent, and general Indian common law compel the conclusion that tribal government employment decisions are "internal tribal matters." The essence of Plaintiff's claim is that if employment decisions of the tribal government are made "the subject of scrutiny" under the MHRA, "the very

decision-making process of tribal government is laid open to state authority." Pl.'s Mot. Summ. J. at 17.

Defendant, on the other hand, argues that the "internal tribal matters" inquiry should be based on state law and urges the Court to use the analysis adopted by the Law Court in Stilphen, or, in the alternative, to use the "five considerations" of the First Circuit's recent decision in Akins. Defendant emphasizes the fact that she is not a tribal member and that this is, therefore, not an intra-tribal dispute, and that the employment decisions of the Nation implicate an important state interest in protecting against discrimination. n2 The Court addresses each of these arguments in turn.

C.

This is not the first time this Court has been called upon to determine the scope of the "internal tribal matters" exception to the Implementing Act, nor is it likely to be the last. This Court, the First Circuit, and the Maine Law Court have approached this issue at various times with different emphases, the common strand in this line of cases being the conclusion that "internal tribal matters" is a case specific inquiry that does not easily lend itself to simple generalizations. At the outset the Court notes that, Defendant's claim to the contrary, the First Circuit has made it clear that the "internal tribal matters" inquiry is a matter of federal law. Akins, 130 F.3d at 485 & n.4. n3

The first of the cases in this area was Stilphen, 461 A.2d 478, in which the Law Court held that the Nation's operation of beano games, prohibited by state law in the absence of a license, was not an "internal tribal matter" and therefore was subject to state regulation. The court reasoned that although

the list of "internal tribal matters" in section 6206(1) of the Implementing Act is not exclusive, the general term "internal tribal matters" followed by a list of illustrations is assumed to embrace only concepts similar to those illustrations. Id. at 489. The Court concluded that beano was not embraced within that term because it is not a "concept similar to" the illustrations provided. Id. As a result, under the Law Court's approach, the term "internal tribal matters" is to be read as "embracing only those matters illustratively listed in the statute and other matters like them," id. at 490, and the sphere within which the Tribe can operate free of state regulation is "narrow." Id. at 482.

Although the Law Court could have rested there, it added that beano "played no part in the Penobscot Nation's historical culture or development. It is not uniquely Indian in character. It is not a traditional Indian practice and has no particular cultural importance for the Nation." Id. at 490. This "unique cultural or historical interest" approach was derived from the legislative history which suggested to the Law Court that the State of Maine, Congress, and the Penobscot Nation believed the purpose of the "internal tribal matters" exception was primarily to protect cultural interests of the Indians. Id.

In Mitchell v. Passamaquoddy Tribe, No. 89-0073-B (D. Me. Jan. 9, 1990) (Recommended Disposition of the Magistrate), aff'd (D. Me. Feb. 1, 1990), the plaintiff, a tribal policeman who was fired by the Tribe, alleged violations of 42 U.S.C. §§ 1981 and 1983, as well as state causes of action against the Passamaquoddy Tribe in federal court. The court held that the Tribe had not acted "under color of state law" because an action to terminate an employee was a matter of tribal law rather than state law. Id. slip op. at 7. The court, relying heavily on general Indian common law, concluded that "given

the relatively sovereign status of the Passamaquoddy Tribe, control over the hiring and firing of a member of the tribal police force is 'an internal tribal matter,' or more specifically, an integral part of tribal government as specified in 30 M.R.S.A. § 6206(1)." Id.

The Mitchell court departed from the Stilphen approach n4, relying primarily on principles of general Indian common law to arrive at the conclusion that the Tribe has a "sovereign, non-municipal status," id. slip op. at 6, despite the fact that the Implementing Act explicitly grants the Passamaquoddy and Penobscot Nations the rights and duties of municipalities subject only to the "internal tribal matters" exception. The First Circuit has since suggested that, although at times instructive, general federal Indian common law should not necessarily be the sole or primary source of guidance in interpreting the Implementing Act because of the unique nature of the federal and state relationship with the Maine tribes. Akins, 130 F.3d 482 at 489. As such, Mitchell, with its nearly exclusive reliance on general Indian common law, is of limited assistance to this inquiry and the Court does not consider it binding precedent.

In the most recent and thorough interpretation of the Settlement Act and the Implementing Act, the First Circuit addressed the "internal tribal matters" provision in the context of the Nation's issuance of stumpage permits. Akins, 130 F.3d 482. The plaintiff in that case sued under 42 U.S.C. § 1983, among other grounds, alleging that he was denied a permit in violation of due process and equal protection. The court held that the Nation's stumpage permit policy, limiting issuance to tribal members who were residents of Maine, was an "internal tribal matter" and, thus, that federal and state courts lacked subject matter jurisdiction over the dispute.

Akins, 130 F.3d at 488. The Court looks primarily to the principles enunciated in Akins for guidance in the present case.

The Akins court looked first to the language of the Implementing Act, concluding that the listed categories of "internal tribal matters" are "exemplars and not exclusive." Id. at 486. As in Akins, the language of the Implementing Act provides limited guidance here. Tribal employment of non-member medical personnel does not fit easily within the "tribal organization" or "tribal government" categories.

Plaintiff contends that forcing it to "submit to the laws and procedures of the State of Maine" harms its right to be "self-governing" and to "control its internal affairs" without state regulation. Pl.'s Mot. Summ. J. at 8. The language of the Implementing Act granting the Nation independence in internal tribal matters, "including . . . tribal organization, [and] tribal government," however, does not necessarily carry with it the absolute right to be self-governing or to control all internal affairs without regard for state law. As the Stilphen court aptly observed, "one would be rash to equate ["internal tribal matters"] with such terms as 'internal and social relations,' 'internal affairs,' or 'tribal self government,' merely because of a partial language overlap." Stilphen, 461 A.2d at 489 (citations omitted). The fact that some tribal government matters may be sufficiently "internal" to justify protection from outside regulation does not mean that all tribal government actions are shielded from the reach of state law. "That a tribe attempts to govern a matter does not render it an internal tribal matter." Akins, 130 F.3d at 486.

Finding the broad language of the Implementing Act relatively unhelpful, the Akins court then identified five

factors that supported a finding that the Nation's stumpage policy was an internal tribal matter. Id. First, "and foremost," the policy at issue purported to regulate only members of the Tribe and "the interests of non-members were not at issue." Id. Second, the policy regulated "the very land that defines the territory of the Nation." Id. at 487. Third, the policy concerned control over the natural resources of that land. Id. Fourth, the policy, at least on its face, did not implicate or impair any interest of the State of Maine. Id. Finally, the court concluded that it was "consistent with prior legal understandings to view the issuance of stumpage permits as an internal tribal matter," noting that "it has long been understood that the power to issue permits is an indirect method of managing a natural resource." Id. at 487-88. The court rested its decision primarily on these five factors, noting that "taken together, [they] resolve the question in favor of this being a internal tribal matter and do so as a matter of law." Id. at 488.

As this case does not involve tribal land, the only Akins considerations relevant to this dispute are the interests of non-members and the interests of the State. The Court notes that "of great significance" to the Akins decision was the fact that the controversy was "an intra-tribal dispute . . . involving only members of the tribe, and not actions by the Nation addressed to non-members." Id. The Akins court concluded that "the tribe's treatment of its members, particularly as to commercial interests, is not of central concern to either Maine or federal law. . .", and, therefore, that "there appear to be no strong policy reasons not to view this as an area appropriate for internal tribal regulation." Id. However, when "the issue involves tribal attempts to regulate non-tribal members, the Supreme Court has often found that those attempts are not within the inherent self-governing powers of a tribe." Id. at

490 (citing Montana v. United States, 450 U.S. 544, 564, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981)). Unlike Akins, the tribal action in this case directly implicates the rights of a non-member.

Moreover, there is little doubt that the Nation's action in this case potentially impairs an important interest of the State of Maine. It is the well established policy of the State "to keep continually in review all practices infringing on the basic human right to a life with dignity . . . and to prevent discrimination in employment . . . on account of race, color, sex, physical or mental disability, religion, ancestry or national origin . . . ." 5 M.R.S.A. § 4552. "The Fair Employment provisions of the MHRA specifically declare as the policy of the State of Maine that every individual has the civil right to secure employment without discrimination . . . ." Maine Human Rights Comm'n v. Canadian Pacific Ltd., 458 A.2d 1225, 1230 (Me. 1983). The MHRA "was meant to have very broad coverage," Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d 369, 373 (Me. 1978), and explicitly includes the actions of municipalities within its scope. 5 M.R.S.A. § 4553(4) & (7). Whereas the subject matter of the Akins suit appeared to have no impact on Maine's laws or other interests, the Nation's action here threatens to undermine an extensive state scheme for protecting citizens of Maine against discrimination. In any other employment context Defendant would be entitled to protection against discrimination. To recognize an absolute tribal immunity from the discrimination laws of the State would clearly frustrate the important state policies that the MHRA serves.

Although the two relevant policy considerations enunciated in Akins strongly suggest that Defendant's employment

relationship with the Nation is not an "internal tribal matter" free from the regulatory reach of the State, the Court looks beyond the "five considerations" for further guidance, noting that the Akins court wrote "cautiously" and "narrowly," because "the problems and conflicting interests presented by [Akins] will not be the same as the problems and interests presented by the next case." Akins, 130 F.3d at 487.

1. Legislative History

Plaintiff argues that the legislative history of the Settlement Act clearly indicates that the Nation has "inherent authority to be self governing" and that Congress intended "to confirm the Nation's inherent right as a sovereign Indian tribe to be 'free from state interference' in its internal affairs." Pl.'s Mot. Summ. J. at 12-14. Therefore, it argues, its employment decisions cannot be regulated by state law. Although Plaintiff accurately restates portions of the Settlement Act's legislative history, its argument begs the question: what are these "internal affairs" that are protected from state interference? As the First Circuit has recognized, "the legislative history is only somewhat helpful because it embodies two conflicting approaches to resolving the question of what is an internal tribal matter." Akins, 130 F.3d at 488. On the one hand, Congress intended an "original, innovative allocation of authority between the State and tribes." Id. at 489. On the other hand, it sought to "recognize the tribe's inherent self-government authority." Id. As a result, the Settlement Act embodies a compromise between the Nation and the State of Maine; "an innovative blend of customary state law respecting units of local government coupled with a recognition of the independent source of tribal authority . . . ." Id. at 489. In light of these competing principles, the legislative history of the Settlement Act does little to clarify

the broad language of the Implementing Act, adopted by Congress in the Settlement Act.

Plaintiff contends in the alternative that Congress' intention to protect the Nation from state law discrimination suits can be gleaned from other sources. First, Plaintiff cites the fact that Congress has expressly exempted Indian tribes from the employment discrimination provisions of Title VII of the 1964 Civil Rights Act, and argues that Congress would not have exempted it from Title VII while leaving it open to claims under similar state laws. See 42 U.S.C. § 2000e(b). The Court rejected this argument in Houlton Band of Maliseet Indians v. Maine Human Rights Comm'n, 960 F. Supp. 449, 455 (D. Me. 1997). As that case thoroughly discussed, "the Title VII exemption of Indians from its definition of 'employer' does not apply to Indians residing in the State of Maine." Id.

Plaintiff also argues that by citing favorably the case of Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978), in the legislative history of the Settlement Act, Congress expressed an intent to "protect tribal governments from the adjudication of civil rights complaints in non-tribal forums" regardless of the source of the claim. Pl.'s Mot. Summ. J. at 21-22. Santa Clara Pueblo held that the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 ("ICRA"), neither expressly nor impliedly authorized civil actions to enforce its substantive provisions against a tribe or its officers in federal court. Santa Clara Pueblo, 436 U.S. at 51-52. Congress, in citing to Santa Clara Pueblo, made no reference to the holding of that case or to the immunity of the Nation from all civil rights actions in non-tribal forums. Rather, Congress cited to Santa Clara Pueblo for the proposition: "The treatment of the . . . Penobscot Nation in

the Maine Implementing Act is original. It is an innovative blend of customary state law respecting units of local government coupled with a recognition of the independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing." S. Rep. No. 96-957, at 29 (1980). This reference to Santa Clara Pueblo is not to be read as invoking all of prior Indian law, for "that would be inconsistent with the unique nature of the Maine settlement and the specific provisions of the Act limiting the application of federal Indian law." Akins 130 F.3d at 489. Congress recognized that the post-settlement Nation had aspects of both an independent sovereign and a local government subject to state law. It is not without significance that Congress, immediately after citing Santa Clara Pueblo, stated:

> The Passamaquoddy Tribe and Penobscot Nation shall have all the powers, immunities, and obligations of any municipality under state law; [the Implementing Act] obligates the Tribe and Nation to extend to non-members residing within the Passamaquoddy Indian Territory or the Penobscot Indian Territory the services and benefits provided by them as municipalities; and it extends to the Tribe and Nation the same protections and exposure that any municipality or municipal official enjoy with respect to suit in the courts of the State or the United States.
>
> S. Rep. No. 96-957, at 29.

Nor does it make sense to read Congress' reference to Santa Clara Pueblo as insulating the Nation from all civil rights actions. Santa Clara Pueblo involved nothing more than statutory interpretation of the Indian Civil Rights Act in light of the common law immunity from suit traditionally enjoyed

by sovereign powers. 436 U.S. at 58-61. Application of all of the general principles enunciated in Santa Clara Pueblo to the Penobscots would render many of the subsequently negotiated provisions of the Implementing Act irrelevant or without effect. The Court will not impute such an intent to Congress.

2. Federal Indian Common Law

Although the Settlement Act does not invoke all of prior federal Indian common law, reference to such law may sometimes be helpful in defining what is an "internal tribal matter." Akins, 130 F.3d at 489. The Court is mindful, however, that federal precedents may be ". . . of little help to a court faced with a claim of inherent sovereignty by a tribe that has had little or no historical relationship with the federal government." Stilphen, 461 A.2d at 484.

Plaintiff argues that "unanimous authority" from other jurisdictions establishes that challenges to employment decisions of tribal governments outside of tribal forums intrude upon "the federally protected right of Indians to be self-governing and to maintain independent control over reservation affairs." Pl.'s Mot. Summ. J. at 15-16. First, the Court notes that, as discussed above, the Settlement Act does not grant the Penobscot Nation the absolute right to be "self-governing and to maintain independent control over reservation affairs." Moreover, any general principles of Indian common law must be considered in light of the unique status of the Penobscot Nation. To support its claim Plaintiff cites three cases without discussion or explanation. Two of the cases cited, Wardle v. Ute Indian Tribe, 623 F.2d 670, 673 (10th Cir. 1980), and Stroud v. Seminole Tribe of Florida, 606 F. Supp. 678, 680 (S.D. Fla. 1985), stand for the

proposition that Indian tribes are subject to federal civil rights laws only when Congress expressly so declares and that Congress has not expressly or impliedly extended several federal discrimination statutes, including 42 U.S.C. §§ 1981, 1983, 1988, 2000d, and the ICRA, to the employment practices of the Indian tribes. Congress has in this case, however, recognized the Penobscot Nation as a municipality generally subject to the laws of the State so long as those laws do not infringe on internal tribal affairs. Unlike Wardle and Stroud, Congress here has expressly authorized all suits against the Nation that could be asserted against a municipality, subject only to the internal tribal matters limitation.

The Court is persuaded that its conclusion is consistent with general principles of federal Indian caselaw, to the extent they are applicable here. "'When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self government is at its strongest.'" Akins, 130 F.3d at 490 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144, 65 L. Ed. 2d 665, 100 S. Ct. 2578 (1980)). The case for application of state law is much stronger, however, where the tribal conduct affects the rights of non-members. In Montana v. United States, 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981), the Supreme Court held that the Crow Indians did not have the power to regulate hunting and fishing by non-Indians on reservation lands owned by non-Indians. The Court noted that in matters "'involving the relations between an Indian tribe and nonmembers of the tribe. . .'" there has been an "'implicit divestiture of sovereignty.'" Id. at 565 (quoting United States v. Wheeler, 435 U.S. 313, 326, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1978)). The tribal "'powers of

self-government . . . involve only the relations among members of a tribe.'" Id. (quoting Wheeler, 435 U.S. at 326). Likewise, in Strate v. A-1 Contractors, 520 U.S. 438. 117 S. Ct. 1404, 1409, 137 L. Ed. 2d 661 (1997), the Court reaffirmed Montana's holding that, in general, the inherent sovereign powers of a tribe "'do not extend to the activities of nonmembers of the tribe.'" (quoting Montana, 450 U.S. at 565). The Akins holding found support in general Indian common law because that case involved a dispute between Tribe members. In contrast, where, as here, "the issue involves tribal attempts to regulate non-tribal members, the Supreme Court has often found that those attempts are not within the inherent self-governing powers of a tribe." Akins, 130 F.3d at 490.

3. Historical and Cultural Importance

Defendant, arguing that interpretation of the "internal tribal matters" provision of the Implementing Act is an issue of state, rather than federal law, asks that the Maine Superior Court be allowed to proceed with an analysis of the historical and cultural importance of employment decisions to the Nation. As noted above, this issue is governed by federal law and the Court is therefore not bound by the approach taken in Stilphen. Akins, while stopping short of discarding Stilphen's historical and cultural importance analysis altogether, certainly left its integrity in doubt. The First Circuit noted that "such broad themes do not help to define the rules of decision in these cases," and warned against making generalizations about historical and cultural importance. Id. at 487. While the historical and cultural importance approach may remain appropriate in some, albeit limited, circumstances, see id. at 488, the Court is persuaded that it is not helpful here where

other considerations are relevant and where the subject matter of the suit does not appear on its face to be "uniquely Indian."

4. Attorney General's Opinion

Finally, Plaintiff notes that in 1984 the Maine Attorney General issued an opinion concluding that "subjecting employment decisions of the Penobscot Nation to the jurisdiction of the Maine Human Rights Commission would create a serious potential of State interference with the internal affairs of the tribal government, a result clearly not intended by the Maine Indian Settlement Act." Op. Att'y Gen. 84-22 (July 25, 1984). This Court, like the Maine Superior Court which also considered this issue, is not persuaded by the Attorney General's decision.

This does not mean, however, that all employment decisions of the Nation are necessarily subject to state regulation. There clearly are certain tribal government employment decisions that cannot be regulated by the State because they are inherent to independent organization or governance. Here, however, the Tribal Council has hired an non-member in a non-policymaking capacity for a position traditionally not associated with governance. The hiring and firing of a community nurse does not implicate the Nation's basic right to organize or govern itself. Under these particular circumstances, the Court concludes that the Nation's decision to fire Defendant is not an "internal tribal matter" and is therefore subject to the MHRA.

Plaintiff argues that subjecting its employment decisions to the MHRA will permit the State to "probe the inner-workings of the Penobscot Nation tribal government and its decision making processes." Pl.'s Mot. Summ. J. at 6. Plaintiff objects

particularly to discovery requests that may require disclosure of Tribal Council rules and organization and to the fact that members of the Council may be subject to the subpoena power of the State. The complaint in this case does not call into question what form of government the Nation chooses, nor does it require that the court resolve the legitimacy of a tribal election or other such "political dispute." See Houlton Band, 960 F. Supp. at 453-54. Rather, the court is called upon solely to decide if the Nation unlawfully discriminated against Defendant in her employment in violation of the MHRA. See id. Any incidental effect of such an inquiry that the Nation finds objectionable, such as disclosure of tribal government structure, does not render the Nation immune from the laws of the State where the conduct at issue does not involve an internal tribal matter. Id. at 454; see also Houlton Band of Maliseet Indians v. Boyce, 1997 Me. 4, 688 A.2d 908, 911 (Me. 1997). Plaintiff's "judicial intrusion" argument, taken to its logical conclusion, would effectively preclude enforcement of all state laws whenever the Tribal Council is peripherally involved in a suit in a non-tribal forum, regardless of whether the subject matter of such suit implicates internal tribal matters. The Court is persuaded that this is not what Congress or the parties to the settlement intended when the Settlement Act was adopted.

"As to state law, the Penobscot Nation and Maine expressly agreed that, with very limited exceptions, the Nation is subject to the laws of Maine." Akins, 130 F.3d at 484-85 (emphasis added). Included in these exceptions are the basic rights of "tribal organization," and "tribal government." Therefore, the Nation has the right to select its form of government and its form of organization, without regard to state influence. However, as Akins recently concluded, this does not mean that anything and everything related to "tribal

government" or "tribal organization" is absolutely protected. In the absence of infringement on the basic rights of independent government and organization, the Nation is subject to the responsibilities of a municipality and, therefore, to the requirements of the MHRA.

IV. CONCLUSION

The Penobscot Nation's employment of Defendant is not an "internal tribal matter" and is, therefore, subject to state law and the requirements of the Maine Human Rights Act. Plaintiff's request for injunctive relief and its Motion for Summary Judgment are DENIED. Defendant's Motion for Summary Judgment is GRANTED.

SO ORDERED.

MORTON A. BRODY

United States District Judge

Dated this 13th day of March, 1998.

Footnotes

n1 For a more thorough discussion of the nature and genesis of the Settlement Act and the Implementing Act, see Akins, 130 F.3d at 484; Passamaquoddy Tribe v. Maine, 75 F.3d 784, 787 (1st Cir. 1996); Penobscot Nation v. Stilphen, 461 A.2d 478, 487-88 (Me. 1983).

n2 In addition to arguing against Plaintiff's motion on the merits, Defendant asks the Court to abstain from asserting

jurisdiction and argues that Plaintiff's request for a declaratory judgment is not ripe. Defendant claims that abstention is appropriate because the Superior Court proceeding has thoroughly addressed the same issues raised here, because the Settlement and Implementing Acts require a federal court to defer to the judgment of the state court, and because Defendant's claims involve a substantial state interest. Had the Superior Court not agreed to stay its proceedings Defendant might have a strong abstention argument. However, the fact that the state court has deferred to the judgment of this Court suggests that this is not an "exceptional circumstance" warranting abstention. See DeNovellis v. Shalala, 124 F.3d 298, 313 (1st Cir. 1997). Mindful that "a litigant 'does not have to await the consummation of threatened injury to obtain preventative relief'" in the declaratory judgment context, the Court is satisfied that this controversy is sufficiently adverse to satisfy the ripeness requirement and that a declaratory judgment would serve a useful purpose. Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 692-93 (1st Cir. 1994) (quoting Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev't Comm'n, 461 U.S. 190, 201, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983)).

n3 Defendant asks the Court to disregard the First Circuit's statement "under the Settlement Act, we consider [this] to be a question of federal law. . ." as dictum because in Akins the parties agreed that the case was to be governed by federal law. Akins, 130 F.3d at 485. Contrary to Defendant's assertion, the First Circuit did not apply exclusively federal law in Akins because the parties so agreed. Rather, it did so after concluding that the language of the Settlement Act and the intent of Congress indicated that the matter was to be governed by federal law. Akins, 130 F.3d at 485 n.4.

n4 Stilphen concluded that "internal tribal matters" must be interpreted not in light of federal Indian common law, but according to the Implementing Act and its legislative history. Stilphen, 461 A.2d at 482.

STATE OF MAINE

SUPERIOR COURT
PENOBSCOT, SS

CIVIL ACTION

DOCKET NO CV-95-275

CYNTHIA FELLENCER

Plaintiff

v.

PENOBSCOT INDIAN NATION

Defendant

DECISION AND ORDER

This matter is before the court on defendant Penobscot Nation's (Nation) motion to dismiss.

Plaintiff Cynthia Fellencer, alleges that she was employed by the Nation, the Community Health Nurse, stationed at Indian Island, Maine. Amended Complaint ¶ 4. Plaintiff claims she was terminated from her employment on September 30, 1994 due to her race and national origin. Id.. at ¶¶8,9. Plaintiff also contends that defendant gave plaintiff a vote "no confidence", and demanded her resignation without cause and in a manner that afforded her no procedural rights. Id. at ¶ 7.

Plaintiff alleges that her termination was in violation of the Maine Human Rights Act, 5 M.R.S.A. § 4552 et seq.. Plaintiff further alleges that defendant's Personnel Policies and Procedures Manual created a contractual limitation on defendant's ability to fire her a will. Plaintiff contends that the Nation breached its employment contract with her because it discharged her without cause did not allowed her to grieve her discharge. Id. at ¶¶ 15-17. Finally, plaintiff contends that defendant's action were taken with malice and justify an award of punitive damages. Id. at ¶ 20.

A motion to dismiss made pursuant to MR.. Civ. P. 12(b)(6) test the sufficiency of the complaint. Marines v. Board of Directors, M.S.A.D. #5, 591 A.2d 867, 869 (Me. 1991). The motion does not test the sufficiency of the evidence a plaintiff may be able to present at trial. Barnes v. McGough, 623 A.2d 144, 145 (Me. 1993). A motion to dismiss "should be denied if the pleading alleges facts that would entitle the plaintiff to relief upon some theory, or if it avers every essential element of recovery." Id. (quotation omitted). Dismissal is " appropriate only if it appears beyond doubt tht plaintiff is entitled to no relief under any set of facts which he might prove in support of his claim. MacKerron v. Madura, 445 A.2d 680, 682 (Me. 1982).

The crux defendant's argument is that the Maine Human Rights Act does not apply to it. Defendant asserts that the Maine Implementing Act, 30 M.R.S.A. §§ 6201 et seq., did not abrogate the unique sovereign status bestowed on Indian tribes under federal law. Accordingly, defendant argues that Indian tribes are beyond the scope of the Maine Human Rights Act because its federal equivalent, Title VII, specifically excludes Indian tribes from its purview. See 42 U.S.C. § 2000e(b). In support of this position, defendant

relies on decisions of the Maine Human Rights Commission, the opinion of the Attorney General and a United States Magistrate recommendation adopted by the United States District Court. Plaintiff contends however that defendant is subject to the Maine Human Rights Act as a Municipal employer and that employment decisions are not protected as " internal tribal matters".

The court concludes that it was not the intent of either the federal or state statutes to define the Nation's relationship with the respective governments in such a way as to prepetuate the traditional immunities established under federal precedent. Rather, relations between the Nation, the State of Maine, and the federal government are controlled by the Maine Implementing Act as ratified by the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721 et seq. Penobscot Nation v. Stilphen, 461 A.2d 478, 482 (Me. 1983). The two acts created a relationship between the tribes, the state and the federal government that is unlike any other in the country. Id at 489; Transcript of March 28, 1980. Thus, the court must look to the relationship created by these tow statues in order to determine whether defendant is subject to the Maine Human Rights Act. Stilton, 461 A.2d at 487.

The Indian Claims Settlement Act provides that the Nation "shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act and that Act is hereby approved, ratified and confirmed." 25 U.S.C. § 1725(b)(1). The Maine Implementing Act in turn provides in part:

30 M.R.S.A. § 6206(1) (1996) (emphasis added). The legislative history of both the state and federal statues confirm that the Nation is to be treated as a municipality. See

Report of Joint Select Committee on Indian Land Claims, Appendix (April 2, 1980) ("The Indian Territories will be unique legal entitles. Although they will not be called muncipalities."); H.R.Rep.No 96-1353, 96th Cong., 2d Sess. 19 (1980) reprinted in 1980 U.S.C.A.A.N. 3786, 3795 ("Essentially, the Maine Implementing Act accords the...Penobscot Nation the status of [a] municipalit[y] under State law...."). Municipalities are subject to liability under the Maine Human Rights Act. 5 M.R.S.A §§ 4553(4), 4553(7). Accordingly, as a municipality, the court concludes that the Nation is subject to the requirement of the Maine Human Rights Act.

The question remains whether defendant's conduct is an "internal tribal matter" thus excluding it from the Maine Implementing Act and concomitantly the Maine Human Rights Act. One court has concluded that "control over the hiring and firing of a member of the tribal police force, is 'an internal tribal matter', or more specifically, an integral part of tribal government as specified in 30 M.R.S.A. § 6206(1)." Mitchell v. Passamaquoddy Tribe, No. 89-0073-B, slip op. at (Recommended Disposition of the Magistrate) aff'd (D.Me. February 1,1990,Carter, employment decisions of the Nation to the jurisdiction of the Maine Human Rights act poses the serious potential of interfering with the internal affairs of the Nation. Op. Me. Att'y Gen. (July 25, 1984).

The court is not persuaded by these decisions. The Law Court has instructed that the term " internal tribal matters" is illustrated by the list following it that inccludes "tribal government" and "tribal organization." Stilpen, 461 A.2d at 489. Relying on legislature history, the law Court concluded that "internal tribal matters" referred o those matters that

were historically and culturally significant or unique to the Nation. Id. at 490. This court can not conclude, as a matter of law. that all decisions of employment by the Nation invoke "areas of particular cultural importance" that must be protected as " internal tribal matters." Based on the record before it, the court can not evaluate the cultural, historical and / or societal role the Community Health Nurse plays in the Penobscot Nation. Absent such an evaluation, the court will not conclude the defendant is not subject to the Maine Human Rights Act.4

In Count II of her amended complaint, plaintiff alleges that defendant's Personnel Policies and Procedures Manual (Manual) created a contractual obligation that limited defendant's ability to discharge plaintiff only for cause. Amended Complaint at § 14. Plaintiff additionally contends that the Manual mandates that plaintiff be able to grieve her discharge. Id. Plaintiff contends that the Nation breached these conditions of its Employment contract. Id at §§ 16,17, Defendant has moved to dismiss Count II of plaintiff's amended complaint.5

There is no evidence in the record that enables the court to conclude that a genuine dispute exists as to whether plaintiff could be terminated for cause only. It is well established that a contract of employment for an indefinite period is terminable at will. Libby v. Calais Regional Hospital, 554 A.2d 1181, 1182 (Me. 1989) (citations omitted). An employee handbook can change he terms of employment thereby limiting an employer's right to discharge an employee. Id at 1183. The handbook, however, must clearly state an intent to impose restrictions on the employers right to

discharge an employee. Id; The handbook, however, must clearly state an intent to impose restrictions on the employer's right to discharge an employee. Id.; Larrabee v Penobscot Frozen Foods,466 A.2d 97, 99-100 (Me. 1984).

The Manual does not "clearly state an intent" to limit the Nation's right to terminate employees at will. The Manual does contain a list of activities that may result in disciplinary action. The introductory statement to that list specifically states however that "[d]isciplinary action, including suspension and termination, may result from but not be limited to any of the following . . . ." Manual at 26 (emphasis added). . The court does not construe this open ended language as explicitly limiting the Nation's ability to discharge employees. Similarly, the fact that the Manual provides a grievance procedure for terminated employees does not clearly state an intent to limit the Nation's right to discharge at will. "Written or oral language merely implying that discharge is for cause only is not sufficient to bind an employer." Bard v Bath Iron Works Corporation 590 A.2d 152, 155 (Me. 1991) (quotation omitted).

Plaintiff must establish that the Manual was part of the employment contract In order to claim that defendant's alleged breach of the grievance procedure constitutes a breach of contract. Plaintiff has not generated an issue as to whether the Manual constituted at least in part a portion of the employment contract. The Introduction to the Manual provides in part

> These Tribal Personnel Policies and Procedures are intended as a guide for employees regarding their Tights and responsibilities as employees of the Penobscot Nation. These policies and procedures are not intended to and do not treat contractual obligations on the part of the Penobscot Nation and

> they do not constitute guarantees of employment for any length of time.

manual at 3. This court recognizes that other courts are split as to the effectiveness of such disclaimers in preventing the terms of the policies from becoming terms of employment. See George L. Blum, Annotation, Effectiveness of Employer's Disclaimer or Representations in Personnel Manual or Employee Handbook Altering At-Will Employment Relationship, 17 A.L.R. 5th 1 (1994).

Notwithstanding the fact that plaintiff recognized defendant's motion on this count as one for summary judgment, plaintiff did not submit any evidence that the pates believed that the Manual constituted the terms of the employment contact. See Roy v. Danes, 553 A.2d 663, 664 (Me. 1989) ("[t]o establish a legally binding agreement the parties must have mutually assented to be bound by all of its material terms . . . ,"). Plaintiff has brought forward no evidence controverting the explicit declarations of the Manual or that those declarations do not represent the intent of the parties. Absent such evidence, the court can not conclude that the Manual constituted the terms of the employment contract between the pates.

Finally, the court concludes that plaintiff is not entitled to punitive damages for her claim made pursuant to the Maine Human Rights Act. LaPlante v United Parcel Service. Inc., 810 F. Supp. 19, 22 (D. Me. 1993); Harris v. International Paper Company 765 F. Supp. 1509, 1525 (D. Me. 1991).

The entry is

> Defendant's Motion to Dismiss Count I is DENIED.

Defendant's Motion to Dismiss/Motion for Summary Judgment on Count II is GRANTED.
Defendant's Motion to Dismiss Count III is GRANTED.

Date: July 25, 1996
Donald H. Marden
Justice, Superior Court

Footnotes

1 See footnote 5 infra.

2 Apparently the Nation had such little contact with the federal government before 1980 that there was even doubt that it was a "bona fide tribe[]" under federal Indian law. Penobscot Nation v. Stilpen, 461 A.2d 478 (Me. 1983). Rather it had a "long and intricate historical relationship with the State of Maine Id.

3 The court recognizes that in cases involving the Maine Human Rights Act "decisions by federal courts interpreting the federal statutory equivalent of the Maine Act provide significant guidance in the construction of our statute." Maine Human Rights Commission v. Local 1361 United Paper workers International Union, 383 A.2d 369, 375 (Me. 1978) (emphasis added). Title VII specifically excludes Indians. 42 U.S.C. § 2000e(b). The Maine Act contains no such " equivalent" exclusions. This court can not create such an exclusion when the legislature has declined to do so, The Law Court has sought "guidance" from the federal case law in such matters as establishing an appropriate burden shifting mechanism. Maine Human Rights Commission v. City of

Auburn, 408 A.2d 1253, 1261-1263 (Me.1979). The court has not, on the other hand, rewritten the statute so as to move closely reflect its federal counterpart. That is the duty of the legislature.

4 The court is influenced by the fact that not all the operational decisionsof the Nation constitute "internal tribal matters" as part of the tribal government. The legislature history specifies that the selection of the school committee is an internal tribal matter but the standards for operating the school, including teacher certification, curriculum, hours, records and other operational requirements are governed by state law. Report of Joint Select Committee on Indian land Claims at 3. This suggests to the court that not all decisions of the Nations regarding the operation and performances of the tribal government are beyond state law jurisdiction.

5 In support of its motion, defendant has submitted a copy of the Manual and the affidavit of Carl G. Mitchell, which states that the Manual was in effect during the course of plaintiff's employment. Both parties rely on the terms of the Manual to support their respective positions. In her opposition, Plaintiff specifically states that "the evidence is sufficient to survive either a motion to dismiss or a motion for summary judgement". Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss at 13. Because the court will consider the Manual, defendant's motion as it pertains to Count II will be considered as one for summary judgment M.R. Civ.P. 12(b).

STATE OF MAINE
SUPERIOR COURT

SUPERIOR COURT

CIVIL ACTION
PFNOBSCOT, SS.
PENOBSCOT COUNTY

DOCKET NO. CV-95-275

FILED AND ENTERED NOV 19 1995

CYNTHIA FELLENCER
Plaintiff

v.

PENOBSCOT NDIAN NATION,
Defendant

This matter comes before the court upon defendant's motion for reconsideration on and to dismiss for lack of subject matter jurisdiction. The Penobscot Indian Nation previously moved to dismiss the plaintiff Fellencer's complaint under M.R. Civ. P. 12(b)(6) (Motion I). In Motion I, the Indian Nation argued that it was not subject to the employment provisions of the Maine Human Rights Ad, from which plaintiff Cynthia Fellencer's (Eellencer) claim under Count I of her complaint derived. Count II of Fellencer's complaint was a breach of contract claim, and Count III was a claim for punitive damages. The court denied the Nation's motion regarding Count L but allowed its motion as to Counts II and IfI

The Nation has brought a motion for relief from judgment or order pursuant to M.R. Civ. P. 60(b)(6) (Motion II), asking the court to reconsider its refusal to dismiss Count I of the plaintiffs complaint The Nation characterizes Motion II as a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). In Motion I, the Nation argued that federal law should govern in this instance since federally-recognized Indian tribes have a unique status. The Nation argued that since Title VII exempts Indian tribes from the definition of employer, then the Penobscot Indian Nation should not be an employer under the Maine Human Fights Act.

The Nation argued in Motion I that the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-1735 and the Maine Implementing Act, 30 M.RS.A. §§ 62014214 (the Settlement Acts) did not abrogate the unique sovereign status bestowed on Indian tribes under federal law. The Nation argued further that its firing of the plaintiff Fellencer constituted internal tribal matters of tribal government and tribal organization and as such, were not governed by the Settlement Acts.

In Motion U, the Nation asserts that the court lacks subject matter jurisdiction of the plaintiff Fellencer's remaining claim. The Nation argues that the plaintiff's claim imposes state regulation upon the tribe's internal tribal matters, including tribal government and tribal organization, in violation of the Settlement Acts. Central to its argument in Motion II, is the Nation's assertion that the plain language of 30 M.R.S.A. 6206(1) prohibits the imposition of state law upon tribal government and tribal organization. The Nation argues that the plaintiffs claim indisputably implicates both tribal government and tribal organization, and therefore, the court lacks subject matter jurisdicdon over the plaintiffs claim The Nation states. "[a]s soon as an employment

decision of the tribal government is made the subject of scrutiny under the Maine Human Rights Act in this court or at the administrative level of the Maine Human Rights Commission, the very decision-making process of tribal government is laid open to state authority."

The Penobscot Indian Nation is reiterating in Motion II the very same arguments it made in Motion I Motion II states over and over again that the plain language of 30 M.R.S.A. 6206(1) makes it obvious that the particular employment decision at issue in this case is an act of tribal government and/or tribal organization This is precisely the issue this court examined in its order regarding Motion I. This court decided that it could not determine whether the Community Health Nurse's role, and her firing by the tribe, would fall under the exception enumerated in 30 M.R.S.A. Sec. 6206(1) because the court has no way to determine the "cultural, historical and/or societal role the Community Health Nurse plays in the Penobscot Nation." In Motion II, the Nation downplays or ignores language in Penobscot Nation v. Stilphen, 461 A.2d 478 (Me. 1983) which indicates that the Indian tribes in Maine have a unique relationship to this state. The Maine Indian Claims Settlement Act affirmed and ratified the Maine Implementing Act, which Act is at least partially analyzed in Stilphen. These issues were ra'sed and dispensed with when this court made its decision and order on Motion I. After reading all the motions in the case carefully, this court fails to find any new or Convincing arguments presented to the court by the Indian Nation in Motion II.

Subject matter jurisdiction is "the court's power to hear and determine cases of the general class or category to which proceedings in question belong." BLACK'S LAW DICTIONARY 1425 (6th ed. 1990). "An Indians tribe

inherent powers cannot be judged in a vacuum, but must be weighed against the interest of the state in applying its law and regulations to the tribe." Stilphen at 483.

The entry will be:

Defendant's motion for reconsideration and to dismiss for lack of subject matter jurisdiction is

DENIED.

DATED: November 18 1996

Justice, Superior Court

January 30,1995

Cynthia A. Fellencer
One Riverdale Place
Orono, ME 04473

RE: E94-0730; Fellencer v. Penobscot Tribal Nation

Dear Ms. Fellencer

This letter is to inform you that the above referenced charge of discrimination has been administravely dismissed.

( ) pursuant to Section 202(F) of the Commission's Procedural Rules due to your request for withdrawal filed with this office.

(xxx) pursuant to Section 202(G) of the Commission's Procedural rules because of this Agency lack of jurisdiction in maters involving employment by the Tribal government.

No further action is contemplated by the Commission at this time. If you have any questions, please do not hesitate to contact this office.

Sincerely,

Patricia E Ryan
Executive Director

cc: Gail Dana-Sockabasin
Michael A. Duddy, Esq.
Kaign Smith Esq.

E-2 (11/93)

STATE OF MAINE

Inter-Departmental Memorandum

Date January 19,1995

Patricia E. Ryan Executive Dft.

Dept. Maine Human Rights Commission

Paul D. Pierce, Chief Investigator

Dept. Maine Rights Commission

ct Administration Dismissal: E94-0730 Fellencer vs. Penobscot Tribal Nation

1. Ms. Cynthia Fellencer, health care, Penobscot Nation, alleges race and color discrimination against Respondent, contending that her race, caucasian, was a factor in the dismissal decision.

2. Through its attorney, Kaighn Smith, Respondent states that the Tribe acting in its governmental capacity, employed complainan, and is not subject to the Maine Human Rights Act or Title VII of the Civil Rights Act.

3. Ms. Fellencer acknowledge the she was an employee of the Tribe, received her pay from the Tribe, and was subject to tribal personnel policies and procedures.

4. The applicable attorney general's opinion reads, in part, ad follows.

"It is now established that the relationship between the State of Maine and the Penobscot Nation is governed by the provisions of the Maine Indian Claims Settlement Act (30 M.R.S.A., § 6201-6214) which has been " approved ratified, and confirmed" by the United States Congress. 25 U.S.C. § 1721(b) (1). See Penobscot Nation v. Stilphen, 461 A.2d 478, 487 (Me.1983), app. dis. 104 S. Ct. 323 (1983)

For the reasons discussed below, the conclusions reached in this opinion are equally applicable to the Passamaquoddy Tribe.

With specific reference to the Powers and duties of the Penobscot Nation, 30 M.R.S.A., § 6206(1) provides, in pertinent part:

Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobsco Nation, within their respective Indian Territories, shall have exercise and enjoy all the rights, privileges powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, Provided, however the internal tribal matters, including membership in the respective tribe or nation, the right to reside within the nation, the respective Indian Territory, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State. (emphasis added).

In view of the foregoing, it seems apparent that a resolution of the question of whether the Maine Human Rights Commission has Jurisdiction to investigate an allegation of

unlawful employment discrimination against the Penobscot Nation turns on whether the employment decisions of the Nation, when acting as a tribal governmental employer, are "internal tribal matters" within the meaning of 30 M.R.S.A. S 6202(1). It is the opinion of this Department that such decisions are "internal tribal matters" and are, therefore, not subject to regulation by the State of Maine.

Subjecting employment decisions of the Penobscot Nation to the Jurisdiction of the Maine Human Rights Commission would create a serious potential of State interference with the internal affairs of the tribal government, a result clearly not intended by the Maine Indian Settlement Act. Accordingly, it is the opinion of this Department that decisions of the Penobscot Nation, as to who will be employed by the tribal government, are "internal tribal matters" not subject to regulation by the State and, therefore, not within the jurisdiction of the Maine Human Rights Commission."

5. Based on the above, administrative dismissal is requested in keeping with 2.02 of our agency's procedural rules, lack of jurisdiction.

AFFIDAVIT OF CYNTHIA A. FELLENCER

Cynthia A. Fellencer, of Orono, County of Penobscot, State of Maine, upon oath, do hereby depose and state as follows:

1. My name is Cynthia A. Fellencer. I am a resident of Orono, Maine.

2. I am not a tribal member of the Penobscot Nation.

3. By letter dated December 10, 1992 from the Penobscot Nation office of Tribal Administration I was notified that I had been selected for employment with the Penobscot Nation as a Community Health Nurse/Diabetes Program Coordinator. A true and accurate copy of the letter I received is attached to my affidavit as Defendant's Exhibit 1 .

4. The minimum qualifications to work as a Community Health Nurse/Diabetes Program Coordinator included being a registered nurse with a valid State of Maine license, as well as possessing a valid State of Maine Drivers License. The qualifications for the position are stated on the job description that I received when I started working for the Penobscot Nation. A true and accurate copy of the job description is attached to my affidavit as Defendant's Exhibit 2.

5. My duties as Community Health Nurse/Diabetes Program Coordinator were extensive, and included much more than treating sick and elderly members of the Tribe. For instance, I filed reports with Indian Health Services relating to communicable diseases; served as Coordinator of the Diabetes Interdisciplinary Team; and functioned as the AIDS Prevention Coordinator. My job duties are described in the job description attached to my affidavit as Exhibit 2.

6. In order to perform my myriad job duties, I frequently traveled off the reservation to attend seminars, training, and meetings. I also had frequent professional contact with individuals who worked for a variety of State of Maine health agencies.

7. As a Community Health Nurse/Diabetes Program Coordinator, I reported to the Medical Director of the Penobscot Nation Health Clinic, During most of the time of any employment at the Health Clinic, the Medical Director was Dr. Kathy Bourgoin. Dr. Bourgoin is not a tribal member of the Penobscot Nation.

8. . The Medical Director reports to the Director of the Penobscot Nation Health Department Throughout my time of employment at the Health Clinic, the Director of the Health Department was Gail Sockabasin Ms. Sockabasin is not a tribal member of the Penobscot Nation.

9. Throughout my employment with the Penobscot Nation as Community Health Nurse/Diabetes Program Coordinator, a large equal employment opportunity poster was displayed in the employees' lunch room at the Health Department. I was in the employees' lunch room hundreds of times during my employment, and am familiar with how the poster was displayed. The photograph attached to my affidavit as Defendant's Exhibit 3 fairly and accurately represents how the poster was displayed in the employee's lunch room during the time of my employment.

10. A great number of the people whom I have met or of whom I have personal knowledge, who work for the Penobscot Nation, are not tribal members of the Penobscot Nation.

11. By letter dated September 27, 1994, I was notified by the Governor of the Penobscot Nation that the Tribal Council had requested my termination but that there were no procedural or substantive grounds for the Council's actions. A true and accurate copy of the letter I received is attached to my affidavit as Defendant's Exhibit 4.

12. In October, 1994, I filed an administrative complaint against the Penobscot Nation with the Office of Federal Contract Compliance Programs ("OFCCP"), asserting that the Nation discharged me for discriminatory reasons in violation of the federal contract between the Penobscot Nation and IHS used to fund my position at the Health Department.

13. By letter dated November 14, 1994, I was notified by the Regional Director for OFCCP that the agency had established jurisdiction over the Penobscot Nation for the purpose of conducting an investigation into my termination A true and accurate copy of the letter I received is attached to my affidavit as Defendant's Exhibit 5.

Dated this 12th day of December, 1997

STATE OF MAINE
COUNTY OF PENOBSCOT

Then personally appeared the above-named Cynthia A. Fellencer and declared the foregoing statements by her to be true and correct and based upon his own personal knowledge.

Sworn to before me and subscribed in my presence

Notary Public Attorney at Law
Nathanel S. Putnam
Print/Type Name

PENOBSCOT NATION
COMMUNITY BUILDING

INDIAN ISLAND MAINE 04468
TRIBAL ADMINISTRATION
PERSONNEL
TEL: 207/827.7776

December 10. 1992

Cynthia Fellencer One Alverdale Place Orono, ME 04481

Congratulations on being selected for employment with the Penobcot Indian Nation as a Community Health Nurse/Diabetes Program Coordinator with the Department of Indian Health Services. We hope that you find your period of employment with our Tribal organization to be a positive and rewarding career experience

Prior to beginning employment, you will need a complete physical evaluation. Tribal members will have to be scheduled for a physical with the Indian Health Services Clinic on Indian Island, by calling 827-6101. Non-tribal members may have one done with their own physician or this office can set up an appointment for you.. The Penobscot Indian Nation will be responsible for this expense.

Please be advised that you are on a ninety (90) day probationary period which will begin on December 9, 1992 and end an March 9, 1993.

There is Paperwork that needs to he filled out prior to December 10, 1992. Please stop by the Personnel Office at your convenience to have these forms completed.

If you have any questions or concerns, please feel free to contact the Personnel Office at 827-7776, ext 232 or stop by the office, located in the Log Cabin buildig on Indian Island.

Again, congratulations!

Job Description

POSITION: Community Health Nurse/Diabetes Program Coordiantor

ACCOUNTABILITY: Medical Director

RESPONSIBILITY: Provide health care and education in the members of the community

DUTIES:

1. Supervision of the Home Aide in the coordination and provision of home of home, health care to members of the Pensbscot community

2. Provide followup home health care as presented by a treatment plan designated by the client's physician

3. Collaborate with the Community Health Educator/RD and the SAS Program Director in the development and implementation of specific health promotion, prevention and education activities for identified at-risk groups

4. Collaborated with the school authorities in the scheduling of the annual school physicians for all grade levels

5. Complete all required reports to the Maine Department of Human Services and Indian Health Services relating to communicable disease

6. Work with the Environmental Health Technician/Local Health Officer to respond to observed or reported environmental health hazards in the community

7. Cover the clinic, when necessary, during the absences of the Clinical Registered Nurse

8. Coordinate the Diabetes Control and Prevention Program

9. Insure followup to the clients screened for diabetes

10. Be a member of the Maternal & Child Health Team

11. Coordinator of he Diabetes Interdisciplinary Team

12. Cooperator with other staff in the development of health promotion initiatives targeting the risk factor adolescents

13. Functions as the AIDS Prevention Coordinator

14. Safeguard all information of a confidential nature

15. Report quarterly on the progress in achieving program goals and objectives

16. Be a member of the Substances Abuse Protective Team

17. Be a member of he Substance Abuse Assessment Team

18. Coordinator diabetes education-blood sugar, insulin, foot care, etc.

19. Arrange and coordinate annual IHS site visits for the Diabetes Project

20. Attend Intertribal Diabetes meetings twice a year

21. Collect information for diabetes community health, and AID reporting as required

22. Other duties as assigned by supervisor

MINIMUM QUALIFICATIONS: Registered Nurse with valid State of Maine License, 3 Years clinical experience, 3 years public health nursing experience in dealing with elders, valid State of Maine driver's license, Native American Preference
Position Type: Full-time

Career Field: Medical

Category: A-S

Pay Ranger:

Revised: December 1992

September 27, 1994

Cynthia Fellencer, R.N.
Community Health Nurse
Penobscot Nation Health Department
5 River Road
Indian Island, ME 04468

Dear Cynthia

It is with regret that I must act upon the Tribal Council's motion of September 6, 1994 in which your registration was requested. During our meetings these past two days, I have expressed my concerns regarding that motion. It is my opinion, based on 16 years involvement in Penobscot administration and having held the elective offices of Tribal Council, Lt. Governor and Governor, that the Personnel Committee and the Council have taken the action for political reasons. There is no existent procedural basis for requesting your resignation, and; further, it is not based on an objective evaluation of your work performance.

The Council's was provided information at the Sept 6, 1994 meeting about a grievance which was heard by the Personnel Committee that involved an employee whom you supervised. The Personnel Committee's findings and considerations were given as the justification for your requested resignation. I have been informed that the Personnel Committee also used that grievance hearing to entertain complaints made by persons who were not involved in the grievance nor were their complaints relevant to the issues under grievance. The Personnel Committee over-stepped its authority and received those complaints. The written complaints were provided to the Council at its meeting on Sept. 6, 1994. (Copies of these complaints have since been provided to you.) There was no opportunity for you to respond to those complaints nor was

there an effort for an administrative complaint hearing process to be invoked to address them. Your immediate supervisor was not seeking any disciplinary action towards you and was not asserting you were deficient in performing your duties as the community health nurse. Nonetheless, the Council composed of the same Personnel Committee members took action to subvert the Personnel Policies and sought to force your resignation.

While there is no procedural basis for the actions taken by the Personnel Committee and the Tribal Council, I have come to the realization that there are formidable barriers to a fair appeal process for you. In essence, the body to whom you would address an appeal has already made its decision. I am most certain there is no chance for reversal of the motion seeking your resignation in the wanting days of my administration or in the next one. Under these circumstances, I sense the inevitable and therefore, reluctantly must ask for your resignation. I am aware that you are preparing to resign and I hope this letter will serve to document the conditions which have precipitated it. Should you need a letter of reference, I would be pleased to prepare one.

Regretfully,

Jerry Pardilla

Supreme Court, U.S.
FILED
MAY 20 1999
CLERK

(2)

No. 98-1690

In The

Supreme Court of the United States

CYNTHIA A. FELLENCER,

Petitioner,

v.

PENOBSCOT NATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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518

QUESTION PRESENTED FOR REVIEW

Whether a decision of the Penobscot Nation about whom to employ as its Community Health Nurse at the Penobscot Indian Reservation to deliver governmental health services to tribal members is an "internal tribal matter," protected by the Maine Indian Claims Settlement Act of 1980 from state regulation in state court pursuant to the Maine Human Rights Act.

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STATUTES INVOLVED

The Maine Indian Claims Settlement Act of 1980, 25 U.S.C.A. §§ 1721-1735 (West 1983) (the "Settlement Act"), provides: "[t]he Passamaquoddy Tribe [and] the Penobscot Nation . . . shall be subject to the civil and criminal jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act. . . . " 25 U.S.C.A. § 1725(b)(1) (West 1983).

The Act to Implement the Maine Indian Claims Settlement, 30 M.R.S.A. §§ 6201-6214 (West 1996 & Supp. 1998-99) (the "Maine Implementing Act"), provides that "the Passamaquoddy Tribe and the Penobscot Nation- . . . shall be subject to the laws of the State, *provided however, that internal tribal matters,* including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income *shall not be subject to regulation by the State.*" 30 M.R.S.A. § 6206(1) (West 1996) (emphasis added).

The Maine Indian Claims Settlement Act of 1980 further provides that "the Penobscot Nation . . . shall be eligible to receive all of the financial benefits which the United States provides to Indians, Indian nations, or tribes . . . to the same extent and subject to the same criteria generally applicable to other Indians, Indian nations or tribes. . . . ," 25 U.S.C.A. § 1725(i) (West 1983), and "in the event a conflict of interpretation between the provisions of the Maine Implementing Act and this subchapter should emerge, the provisions of this subchapter shall govern," 25 U.S.C.A. § 1735(a) (West 1983).

The Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C.A. §§ 450-450n (West 1983 & Supp. 1999) (the "Indian Self-Determination Act"), provides, in pertinent part:

> (1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and
>
> (2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations and persons.

25 U.S.C.A. § 450(a) (West 1983).

The Indian Health Care Improvement Act of 1976, *as amended*, 25 U.S.C.A. §§ 1601-1683 (West 1983 & Supp. 1999), provides, in pertinent part:

> (a) Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people.
>
> (b) A major national goal of the United States is to provide the quantity and quality of health services which will permit the health status of Indians to be raised to the highest possible level

> and *to encourage the maximum participation of Indians in the planning and management of those services. . . .*
>
> . . . .
>
> (d) . . . [T]he unmet health needs of the American Indian people are severe and the health status of the Indians is far below that of the general population of the United States.

25 U.S.C.A. § 1601 (West 1983 & Supp. 1999) (emphasis added).

The Indian Self-Determination Act further provides, in pertinent part, that "[a]ny contract, subcontract, grant, or subgrant pursuant to this subchapter . . . or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians. . . . " 25 U.S.C.A. § 450e(b)(1) (West Supp. 1999).

STATEMENT OF THE CASE

Pursuant to a January 12, 1993 vote of the Penobscot Nation Tribal Council, the Penobscot Nation's governing body, the Penobscot Nation (the "Nation" or the "Tribe") hired Petitioner as its Community Health Nurse/Diabetes Program Coordinator ("Community Health Nurse") to serve in its Health Department. Appendix ("App.") at 1a. Petitioner's job consisted of administering the Tribe's

governmental health services to the reservation community, including treatment and health education of tribal members. Appendix to Petition ("P.App.") at 65a-66a. Although Petitioner is not Native American, her job description listed "Native American Preference" and "experience in dealing with elders" as "minimum qualifications." *Id.* at 67a. Her duties included supervising the provision of "home health care to members of the Penobscot community," coordinating the "Diabetes Interdisciplinary Team" and the "annual IHS [Indian Health Services] site visits for the Diabetes Project," serving as a member of the "Maternal & Child Health Team" and the "Child Protective Team," and functioning as the "AIDS Prevention Coordinator." *Id.* at 65a-67a.

The Penobscot Nation Health Department, which runs the Penobscot Nation Health Clinic, is a governmental department of the Nation. App. at 1a, 3a. The Health Clinic was created in 1978 with funding provided to the Tribe under a contract with the United States Indian Health Services ("IHS") pursuant to the Indian Self-Determination Act. *Id.* at 3a, 6a-7a. The Community Health Nurse position was one of the original jobs funded under the Nation's first IHS contract, and was first held by Penobscot tribal member Ruth Davis, after whom the Nation's Health Clinic is named. *Id.* at 7a. Throughout Petitioner's employment at the Tribe, the Penobscot Nation Health Department, including Petitioner's position as Community Health Nurse, continued to be funded under a contract with IHS pursuant to the Indian Self-Determination Act. *Id.* at 6a-7a.

After receiving complaints concerning Petitioner's treatment of elder tribal members, the Penobscot Nation

Tribal Council voted to terminate her employment, effective September 30, 1994. *Id.* at 1a, 3a, 5a. Petitioner then filed a Charge of Discrimination with the Maine Human Rights Commission ("MHRC"), asserting that the Tribe had engaged in race and national origin discrimination by giving preference to Native Americans over her. *Id.* at 9a. On January 20, 1995, the MHRC dismissed Petitioner's claims, citing its "lack of jurisdiction in matters involving employment by Tribal government" under the long-standing Opinion of the Maine Attorney General. P.App. at 55a-59a.[1]

Petitioner subsequently filed an action in the Maine Superior Court against the Nation, claiming race and/or national origin discrimination under the Maine Human Rights Act, 5 M.R.S.A. §§ 4551-4632 (West 1989 & Supp. 1998-99) (the "MHRA"). *Petition* at 5. The Nation moved to dismiss on the ground that such a claim imposed state law upon the Tribe's "internal tribal matters" in violation of the Settlement Act. Exhibit 11 to First Circuit Record Item ("R. No.") 12. The Maine Superior Court denied the Tribe's motion (as well as a subsequent motion for reconsideration) and ordered the Nation to submit to state court procedures and discovery. Exhibit 13 to R. No. 12. On October 20, 1997, the Nation brought an action in the United States District Court, seeking declaratory and injunctive relief to enforce its Settlement Act right to be free from state regulation over its internal tribal matters. R. No. 1. As a result, the Maine Superior Court stayed its proceedings. Exhibit 19 to R. No. 12.

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[1] The Maine Attorney General Opinion is set forth in the Appendix. App. at 10a-14a.

With the support of the United States of America as *amicus curiae*, the Nation filed a motion for summary judgment, and Petitioner cross-moved for summary judgment. R. Nos. 11-13, 15. On March 13, 1998, the district court entered judgment in favor of Petitioner, holding that the tribal government's personnel decision with regard to its Community Health Nurse did not invoke the right of the Tribe to organize or govern itself and therefore was not an internal tribal matter. P.App. at 37a . The Nation timely appealed the district court's judgment to the United States Court of Appeals for the First Circuit. R. No. 21. On January 19, 1999, a unanimous panel of the First Circuit reversed. Tracking considerations outlined in its prior decision, *Akins v. Penobscot Nation*, 130 F.3d 482 (1st Cir. 1997), and reviewing Congress's recognition of the importance of community health care for the integrity of Indian communities, the First Circuit held that the Nation's employment decision concerning Petitioner was an "internal tribal matter." *Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir. 1999). P.App. at 1a-17a.

STATEMENT OF JURISDICTION

Subject matter jurisdiction rested in the district court pursuant to 28 U.S.C. § 1362 (Indian tribes) and 28 U.S.C. § 1331 (federal question). The First Circuit's jurisdiction was based upon 28 U.S.C. § 1291. Petitioner seeks a writ of certiorari from this Court pursuant to 28 U.S.C. § 1254(1).

SUMMARY OF ARGUMENT

The question presented in this case has no implications beyond the State of Maine, is confined to the facts of this case, and is distinct from the legal issue presented in *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me. 1983), *appeal dismissed*, 464 U.S. 923 (1983). There is no fundamental principle of federal law at stake in conflicting decisions to warrant issuance of a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. BACKGROUND

A. The "Internal Tribal Matters" Provision:

The Constitution vests Congress with plenary authority over Indian affairs. U.S. Const. art. I, § 8, cl. 3; *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985). In 1980, Congress enacted the Maine Indian Claims Settlement Act, and authorized state jurisdiction over the Penobscot Nation and the Passamaquoddy Tribe, with the limitation that "internal tribal matters, including tribal organization [and] tribal government . . . *shall not be subject to regulation by the State.*" 25 U.S.C.A. § 1725(b)(1), *ratifying* 30 M.R.S.A. § 6206(1) (emphasis added) (the "internal tribal matters provision"). The final Committee Reports of both the House and the Senate assuaged the Penobscot Nation's fears that this provision would destroy its sovereignty:

> Until recently, the Maine Tribes were considered by the State of Maine, the United States, and by the Maine courts, to have no inherent sovereignty. Prior to the settlement, the State passed

> laws governing the internal affairs of the Passamaquoddy Tribe and the Penobscot Nation, and claimed power to change these laws or even terminate these tribes. In 1979, however, it was held in *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979), that the Maine Tribes still possess inherent sovereignty to the same extent as other tribes in the United States. The Maine Supreme Judicial Court reversed its earlier decisions and adopted the same view in *State v. Dana*, 404 A.2d 551 (Me. 1979), *cert. denied*, 100 S.Ct. 1064 (Feb. 19, 1980). While the settlement represents a compromise in which state authority is extended over Indian territory . . . , in keeping with these decisions *the settlement provides that henceforth the tribes will be free from state interference in the exercise of their internal affairs.* Thus, rather than destroying the sovereignty of the tribes, *by recognizing their power to control their internal affairs* and by withdrawing the power which Maine previously claimed to interfere in such matters, *the settlement strengthens the sovereignty of the Maine Tribes.*

S. Rep. No. 957, 96th Cong., 2d Sess., at 14 (1980); H.R. Rep. No. 1353, 96th Cong., 2d Sess., at 14-15 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 3790 (emphasis added). The Senate Report further stated that the Settlement Act recognized "the independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing." S. Rep. No. 957 at 29 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)).

B. The First Circuit's Decision in *Akins v. Penobscot Nation*:

In *Akins v. Penobscot Nation*, 130 F.3d 482 (1st Cir. 1997), the First Circuit addressed what constitutes an "internal tribal matter" under the Settlement Act. Andrew Akins, a member of the Penobscot Nation, brought an action in federal district court against the Tribe, seeking to strike down a tribal policy concerning the harvesting of timber on tribal lands. The tribal timber regulation restricted logging permits to tribal members who resided in Maine. Akins claimed that it was enacted to discriminate against him as a non-resident and should be stricken under state and federal laws. The Penobscot Nation argued, *inter alia*, that its timber policy was an "internal tribal matter," and, therefore, not subject to review under state law. *See id.* at 484.

Recognizing that the Tribe's attempt to govern a matter could not, by itself, make it an "internal tribal matter," the First Circuit decided that the listed statutory exemplars (e.g. "tribal government" and "tribal organization") were not helpful in resolving the question before it. Writing narrowly for the particular problem presented, the court found five considerations helpful to its decision: whether the tribal regulation was confined to Indian territory, whether it addressed tribal resources, whether it affected state interests, whether it regulated non-members, and whether prior legal understandings supported treating the regulation as an internal tribal matter, free from state jurisdiction. *Akins*, 130 F.3d at 488-90. Weighing these factors together, the First Circuit held that the

Tribe's timber regulation was an "internal tribal matter" and not subject to review under state law. *Id.* at 489-90.

C. The First Circuit's Decision in *Penobscot Nation v. Fellencer*:

In *Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir. 1999), the First Circuit repeated that it had not offered the five considerations in *Akins* "as an essential test for determining which tribal actions constitute 'internal tribal matters.' " It further stated:

> [W]e do not offer them now for that purpose. Instead, we use the *Akins* considerations as one source of guidance in resolving this case. And, in the spirit of *Akins*, we consider another pertinent factor, the nature of the position involved in this case.
>
> Evaluating all of these considerations, with particular emphasis on the interest of the State of Maine, prior legal understandings, and the nature of Fellencer's position, we conclude that the decision of the Nation to terminate Fellencer's employment was an "internal tribal matter."

Fellencer, 164 F.3d at 709-10. P.App. at 8a-9a.

* * *

Petitioner seeks a writ of certiorari, claiming: (1) that these narrowly drawn decisions of the First Circuit generate an intractable conflict with the Maine Supreme Judicial Court's decision in *Penobscot Nation v. Stilphen*, *supra* and (2) that the issue presented by the First Circuit's *Fellencer* decision is one of national significance. As set

forth below, the differences between the First Circuit approach and that of the Maine Supreme Judicial Court do not warrant granting the writ, and Petitioner's assertion that the issue presented has national significance is without merit.

II. DIFFERENCES BETWEEN THE FIRST CIRCUIT'S DECISIONS IN *AKINS* AND *FELLENCER*, ON THE ONE HAND, AND THE MAINE SUPREME JUDICIAL COURT'S DECISION IN *PENOBSCOT NATION V. STILPHEN*, ON THE OTHER, DO NOT WARRANT GRANTING A WRIT OF CERTIORARI.

While the First Circuit in *Akins*, and now in *Fellencer*, has taken a different approach to the construction of the "internal tribal matters" provision than that of the Maine Supreme Judicial Court in *Stilphen*, a writ of certiorari is not warranted on that basis. In both cases, the First Circuit faced distinct facts and a different legal issue than that in *Stilphen*. Indeed, in *Fellencer*, the First Circuit carefully distinguished *Stilphen*:

> Although Fellencer, unlike Akins, is not a member of the Nation, and hence the effect of the decision at issue is not limited to tribal members, the decision to terminate Fellencer as the community health nurse affects many tribal members but only one non-tribal member (Fellencer). This limited impact beyond the Nation distinguishes this case from *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me. 1983), wherein the Maine Supreme Judicial Court held that a 'beano' game, a tribal enterprise designed to involve many non-tribal members, did not become an "internal tribal matter" simply

> because an Indian tribe funded government services with beano game's profits. *See id.* at 486. Holding that the public gambling events were "related to tribal self-government only because of the use to which its profits are put," the *Stilphen* Court held that the tribe had no "inherent right to 'market an exemption from state taxation' to the public." *Id.* (quoting *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980)). The "beano" games in *Stilphen* were designed to "draw many hundreds of players to the Penobscot reservation from all over Maine and beyond." *Stilphen*, 461 A.2d at 480. Here the employment decision has its immediate effect only on one non-tribal member.

Fellencer, 164 F.2d at 710. P.App. at 9a.

Not only is *Stilphen* factually distinct from the case at bar, but it supports the same result. As the 1986 Maine Attorney General Opinion stated, under *Stilphen*, a decision by tribal government about who will or will not be an employee of the Tribe at the Penobscot Reservation is an integral aspect of tribal government and therefore an "internal tribal matter." *See* Maine Attorney General Opinion No. 84-22 (July 25, 1986), App. at 10a-14a. Reasoning from the *Stilphen* Court's holding that fundamental aspects of tribal government are "internal tribal matters," the Maine Attorney General concluded:

> Subjecting employment decisions of the Penobscot Nation to the jurisdiction of the Maine Human Rights Commission would create a serious potential of State interference with the internal affairs of the tribal government, a result

> clearly not intended by the Maine Indian Settlement Act. *Accordingly, . . . decisions of the Penobscot Nation, as to who will be employed by the tribal government, are "internal tribal matters" not subject to regulation by the State and, therefore, not within the jurisdiction of the Maine Human Rights Commission.*

App. at 14a (emphasis added).

The integral relationship between tribal government and the Penobscot Nation's decision to discharge Petitioner from the Penobscot Nation Health Department is further reinforced by the First Circuit's discussion of the statutory origins of Petitioner's position:

> The community nurse position from which Fellencer was dismissed is funded by the Indian Self-Determination and Education Assistance Act of 1975 (ISDA), 25 U.S.C. § 450 et seq. Congress therein declared its policy to "respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of . . . Federal services to Indian communities." 25 U.S.C. § 450a(a); *see also* S.Rep. No. 102-392, at 7 (1992), *reprinted in* 1992 U.S.C.C.A.N. at 3949 (1992 amendments to Indian Health Care Improvement Act) ("health care provided by people of one's own culture is the most appropriate, and results in better utilization of health care services"). Believing that the administration of such services by Indians was "crucial to the realization of self-government," 25 U.S.C. § 450(a)(1), Congress included an employment preference for Indians in the legislation. 25 U.S.C. § 450e(b) (requiring that "preferences and

> opportunities for training and employment . . . shall be given to Indians").

Id. at 713. P.App. at 14a-15a.[2] Thus, applying the *Stilphen* test for an "internal tribal matter" (i.e. whether the matter is a fundamental aspect of tribal government or tribal organization), the Penobscot Nation's decision about whom to employ as its Community Health Nurse surely meets the test.[3]

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[2] Regulations for the administration of IHS, including the Nation's Community Health Nurse, further declare the intent of the Secretary of Health and Human Services to: "remove any obstacles which might hinder Indian tribes and tribal organizations including obstacles that hinder tribal autonomy and flexibility in the administration of such programs," 25 C.F.R. § 900.3(b)(1); support tribal health programs that "meet the needs of their communities consistent with their diverse demographic, geographic, economic, cultural, health, social, religious and institutional needs," *id.* § 900.3(b)(3); "assist Indian tribes in the development of strong and stable tribal governments capable of administering quality programs that meet the tribally determined needs and directions of their respective communities," *id.* § 900.3(b)(7); and "work cooperatively with tribal governments on a government-to-government basis so as to expedite the transition away from Federal domination of Indian programs and make the ideals of Indian self-government and self-determination a reality," *id.* Community Health Representatives at federal Indian reservations must be trained and supervised by the IHS to give "appropriate consideration" to "lifestyle factors that have an impact on Indian health status" and "promote traditional health care practices of the Indian tribes served consistent with the Service standards." 25 U.S.C.A. § 1616 (West 1983).

[3] As the United States pointed out in its *amicus* brief to the district court, Petitioner's MHRA claim in the state court directly imposes state regulation upon the Penobscot Tribal Council's governmental decision. R. No. 13 at 6. The very nature

Finally, the *Stilphen* Court, unlike the First Circuit in *Akins* and *Fellencer*, did not squarely address the construction of the "internal tribal matters" provision as a question of federal law. Although it considered, but was not persuaded by, federal Indian common law in its application of the internal tribal matters provision to the facts before it, the *Stilphen* Court ultimately construed the provision as if it were a part of an ordinary state statute. *See Stilphen*, 461 A.2d at 489 (looking to "*the* statute itself [the Maine Implementing Act] and *its* legislative history" to construe the provision) (emphasis added). The *Stilphen* Court did not consider Congress's intent in ratifying the provision; notwithstanding the fact that such ratification was the *sine qua non* for rendering it effective. *See* U.S. Const. art. I, § 8, cl. 3. *See also* 1979 Me. Laws c. 732 § 31 (Maine Implementing Act effective only upon federal approval). Thus, since the Maine Supreme Judicial Court has yet to squarely render a holding on the internal tribal matters provision as a question of federal law, there is no fundamental conflict on a question of federal law between the First Circuit and the Maine Supreme Judicial Court to warrant granting the writ.

For all of these reasons, differences between the First Circuit approach to construing "internal tribal matters"

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of Petitioner's cause of action would require state law scrutiny of a tribal government decision, contrary to Congress's intent that non-Indians be excluded from such decision-making. *Id.* (quoting S. Rep. No. 957, *supra* at 15).

and that of the *Stilphen* Court do not warrant granting a writ of certiorari.[4]

III. THE FIRST CIRCUIT'S DECISION HAS NO SIGNIFICANCE BEYOND MAINE.

Petitioner makes two arguments under the general assertion that the *Fellencer* case has national significance. First, Petitioner asserts that the First Circuit's decision failed to adequately consider the interest of the State of Maine in applying the MHRA "uniformly to all employers in the State." *Petition* at 12. Second, Petitioner asserts that the issue presented is one of national significance: whether the employment decisions of federally recognized sovereign Indian tribes "should be open to challenge in state court on the basis of a state's anti-discrimination laws." *Petition* at 13. The Penobscot Nation addresses each argument in turn.[5]

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[4] As an afterthought, Petitioner states that the "procedural posture" of this case should warrant granting a writ of certiorari. *Petition* at 10. Petitioner never challenged the procedural posture of the case in the First Circuit and fails to present any issue for review in this regard. *See Petition* at i ("Question Presented for Review"). Such an ill-defined, unpreserved argument cannot serve as the basis for granting a writ of certiorari.

[5] The Nation notes that Petitioner attempts to bolster her "national significance" argument by suggesting that Indian tribes are thriving entrepreneurial communities. *E.g. Petition* at 4. Unfortunately, this is grossly inaccurate. As the United States Department of the Interior's recent *Indian Labor Force Report* shows, as of 1997, "[h]alf of the work force in Indian Country remained unemployed" and "[o]f the 378,853 adult Indians who were employed in 1997, 30 percent (113,904) were still living

Petitioner's assertion that the First Circuit's decision harms an interest of the State of Maine to uniformly enforce the MHRA across all employers, of course, has nothing do to with anything beyond Maine. In any event, it fails to recognize that the State of Maine, through its Attorney General and MHRC, has long viewed the employment decisions of the Penobscot Nation and the Passamaquoddy Tribe as "internal tribal matters," and, therefore, not subject to the MHRA. App. at 14a & n.3. Thus, uniform enforcement of the MHRA, by the very state agency charged with its enforcement, stops at the employment decisions of these Indian tribes. Beyond this, Petitioner should not now be heard to assert that the State of Maine must be able to apply the MHRA "uniformly to all employers in the State" when Petitioner conceded to the First Circuit that "employment decisions concerning upper level tribal employees, such has heads of departments, might plausibly be viewed as fitting within the categories of 'tribal government' or 'tribal organization.' " Brief of Appellee to the First Circuit at 5 n.1. The First Circuit properly considered the interest of the State of Maine in reaching its decision, and there is no "clash of fundamental values at stake within the State's borders," *Petition* at 12.[6]

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below poverty guidelines established by Health and Human Services." United States Department of the Interior, Bureau of Indian Affairs, Office of Tribal Services, *Indian Labor Force Report: Portrait 1997*, at iii (Washington, D.C., Bureau of Indian Affairs, 1999).

[6] Notably, Petitioner has chosen not to bring her claims of race and national origin discrimination in the Penobscot Nation Tribal Court pursuant to the equal protection provisions of the Indian Civil Rights Act of 1968, 25 U.S.C.A. § 1302(8) (West 1983).

Petitioner's statement that this case has national significance is wrong. As a practical matter, employment discrimination lawsuits against federal Indian tribes, outside of tribal forums, would be extremely rare. This is because, absent an express waiver by Congress or the particular tribe, federal Indian tribes have sovereign immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Likewise, absent an express grant of authority from Congress, states generally lack civil regulatory authority over the reservation activities of federal Indian tribes. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 214-15 (1987); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 170-71 (1973). "Public Law 280," 28 U.S.C.A. § 1360 (West 1993), provides, in reference to six States, that "those civil laws of such State that are of general application to private persons . . . shall have the same force and effect within . . . Indian country as they have elsewhere within the State." But in *Bryan v. Itasca County*, 426 U.S. 373 (1976), this Court unanimously held that Public Law 280 does not give those states civil regulatory jurisdiction over the reservation affairs of tribal governments and tribal members. *Id.* at 388-89. Rather, Public Law 280 provides only for state court adjudication of private-party disputes (e.g. torts and contracts) between Indian parties or between Indians and non-Indians. *Id.* at 383-84. It does not apply to federal Indian tribes. *See id.* at 388-89. Thus, absent a unique grant of state authority over Indian tribes (and none are cited by Petitioner), the question of whether a federally

recognized Indian tribe would be subject to state employment discrimination claims in a state court simply will not arise.[7]

CONCLUSION

For all of the above reasons, this Court should deny the Petition for Writ of Certiorari.

Dated: May 20, 1999

Respectfully submitted,

KAIGHN SMITH, JR., Esq.
Counsel of Record
DRUMMOND, WOODSUM & MACMAHON
245 Commercial St.
Portland, Maine 04101
207-772-1941
Counsel for Penobscot Nation

[7] Of course, there is nothing novel about federal Indian tribes' immunity from employment discrimination laws. Congress expressly excluded tribal employment from Title VII of the Civil Rights Act of 1964. 42 U.S.C.A. § 2000e(b) (West 1994) (term "employer" does not include Indian tribes). *See also id.* § 2000e-2(i) (employment practices giving preference to Indians employed in businesses on or near reservations excluded from Title VII).

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AFFIDAVIT OF MARK MITCHELL

Now comes Mark Mitchell, who states, under oath, as follows:

1. My name is Mark Mitchell. I am a member of the Penobscot Nation (the "Tribe"), and I served on the Penobscot Nation Tribal Council at all times during the course of Cynthia Fellencer's employment as Community Health Nurse/Diabetes Coordinator at the Penobscot Nation Health Department.

2. The Tribal Council approved the employment of Cynthia Fellencer as Community Health Nurse/Diabetes Coordinator within the Penobscot Nation's Health Department on January 12, 1993.

3. The Penobscot Nation Health Department is a governmental department of the Penobscot Nation.

4. At all times during the course of her employment by the Penobscot Nation, Cynthia Fellencer was an employee of the Penobscot Nation Tribal Government, subject to the authority and control of the Penobscot Nation Tribal Council.

5. At all times during the course of her employment by the Penobscot Nation, Cynthia Fellencer was paid out of the governmental funds of the Penobscot Nation.

6. Between April and September, 1994, the Penobscot Nation Tribal Council received complaints from tribal members about the medical treatment provided to elder members of the Tribe by Cynthia Fellencer, and

on September 6, 1994, the Tribal Council voted to terminate her employment at the Tribe.

Dated: 11/10/97 /s/ Mark Mitchell
Mark Mitchell

State of Maine
Penobscot, S.S.

Personally appeared the above-named Mark Mitchell, who stated, under oath, that the foregoing facts are true upon his personal knowledge before me,

Dated: 11/10/97 /s/ D. Lorraine Dana
Notary Public

OFFICIAL SEAL
D. Lorraine Dana
NOTARY PUBLIC – STATE OF MAINE
My commission expires November 20, 2002

AFFIDAVIT OF CARL G. MITCHELL

CARL G. MITCHELL deposes and states, under oath, as follows:

1. My name is Carl G. Mitchell. I am the Personnel Director for the Penobscot Nation. In that capacity, I oversee personnel matters pertaining to the Penobscot Nation.

2. I was Personnel Director for the Penobscot Nation at the time Cynthia Fellencer was employed as Community Health Nurse/Diabetes Coordinator at the Penobscot Nation Health Department.

3. The Penobscot Nation Health Department operates on the Penobscot Indian Reservation to provide health services to on-reservation members of the Penobscot Nation. Funds for the Penobscot Nation Health Department are provided to the Penobscot Nation by the United States Department of Health and Human Services, Indian Health Services, pursuant to the United States Indian Self-Determination Act.

4. In her position as Community Health Nurse/Diabetes Coordinator, Cynthia Fellencer treated sick and elderly members of the Tribe on the Penobscot Reservation.

5. On September 6, 1994, after receiving complaints from members of the Penobscot Nation about her treatment of the tribal members, the Penobscot Nation Tribal Council voted to terminate Cynthia Fellencer's employment, and she was discharged as a result of that decision on September 30, 1994

Dated: 11/19/97 /s/ Carl G. Mitchell
Carl G. Mitchell

Personally appeared the above-named Carl G. Mitchell, who stated, under oath, that the foregoing facts are true upon his personal knowledge, before me.

Dated: Nov. 19, 1997 /s/

D. Lorraine Dana
Notary Public

OFFICIAL SEAL
D. Lorraine Dana
NOTARY PUBLIC – STATE OF MAINE
My commission expires November 20, 2002

[PENOBSCOT NATION'S RESPONSES TO INTERROGATORIES PROPOUNDED BY PLAINTIFF (Fellencer v. Penobscot Nation, Maine Superior Court, Penobscot County, CV-95-275)]

The Penobscot Nation hereby responds to Plaintiff's Interrogatories as follows:

* * *

25. Describe in detail the comments made regarding Ms. Fellencer at the Tribal Council meeting of September 6, 1994. Identify the author and substance of each comment.

* * *

ANSWER TO INTERROATORY 25:

* * *

The Personnel Committee presented a Council Action Request to the Tribal Council, asking Tribal Council to issue a vote of No Confidence regarding Plaintiff's employment, to request her resignation effective in 2 weeks, and if she did not so resign, to terminate her employment. The Tribal Council duly approved the Personnel Committee's Council Action Request.

The Tribal Council received, as part of the Council Action Request, a letter dated 9/4/94 from Penobscot Nation tribal member, Barbara Daigle Francis (Power of Attorney for Esther Albert), setting forth complaints about Plaintiff's treatment of senior tribal member, Esther Albert and two letters, dated 3/5/94 and 4/1/94, from senior tribal member, Judy Cote, a diabetic, complaining about Plaintiff's treatment of her.

* * *

39. State when and how the Penobscot Nation's Department of Indian Health Services, or any predecessor department, was created, and describe any and all documents which discuss creation of the Department of Indian Health Services.

* * *

ANSWER TO INTERROGATORY 39:

* * *

The first contract was signed for Indian Health Services (IHS) in 1978. But one year prior to that, the Nation received a grant from IHS to study the health needs of its members at Indian Island.

See Documents attached.

40. State when and how the Indian Health Services Clinic on Indian Island, or any predecessor clinic, was established, and describe any and all documents which discuss creation of the Indian Health Services Clinic.

* * *

ANSWER TO INTERROGATORY 40:

* * *

See answer to Interrogatory 39.

41. Describe the organizational structure of the Department of Indian Health Services, including but not limited to the role of the Indian Health Services Clinic. Include with your response a complete staffing diagram for the department and clinic which lists the name of each

position, and the name of the persons who occupied each position as of September 27, 1994.

* * *

ANSWER TO INTERROGATORY 41:

* * *

The Penobscot Nation Health Department is a department of tribal government. The clinic was funded in 1994 under a subcontract between the Penobscot Nation and IHS pursuant to P.L. 93-638. It is currently funded by an IHS self-governance compact. Defendant has no such "staffing diagram." See also answer to Interrogatory 43.

42. State when and how the position of Community Health Nurse/Diabetes Program Coordinator was established, and describe any and all documents which discuss creation of the Community Health Nurse/Diabetes Program Coordinator.

* * *

ANSWER TO INTERROGATORY 42:

* * *

It was one of the original positions funded under the first IHS contract for the purpose of establishing the Penobscot Nation Health Department and it was filled by Penobscot tribal member, Ruth Davis, a registered nurse, after whom the Penobscot Nation Health Clinic is now named.

In the early 1980s, Indian Island was chosen by IHS as a model site for IHS diabetes program moneys. The

Diabetes Program was then set up and the coordinator position established.

* * *

Dated: 7-28-97

[Francis Mitchell]
Chief, Penobscot Nation

Personally appeared the above-named, Francis Mitchell, Chief, Penobscot Nation, who stated, under oath, that the foregoing responses are true upon his personal knowledge, information, or belief, before me,

Dated: 7-28-97

[Elizabeth J. Kimball]
Notary Public

CHARGE OF DISCRIMINATION
E94-0730
Maine Human Rights Commission

* * *

Ms. Cynthia A. Fellencer

* * *

Cause of Discrimination Based on:

XX Race XX National Origin XX Age

* * *

The Particulars Are:

I was employed by the Penobscot Tribal Nation as the Community Health Nurse/Diabetes Program Coordinator, from December 9, 1992 to September 30, 1994. The program I worked for is funded by federal contract No. 285-92-0001. On September 6, 1994, the Penobscot Tribal Council voted "no confidence" in me and the Director of the Health Program, Ms. Gail Dana-Sockabasin. Ms. Dana-Sockabasin is a Native American. On September 30, 1994, I was dismissed from my position. Ms. Dana-Sockabasin was not dismissed. As stated by Jerry Pardilla, then Governor of the Penobscot Nation, there was no objective basis for my discharge. I believe the only reasons I was dismissed was on the basis of my race or national origin, or age, in violation of state and federal law. The Penobscot Nation has advertised to fill my position giving preference to Native American applicants.

* * *

SIGNATURE OF COMPLAINANT

(Cynthia A. Fellencer)

Office of the Attorney General
State of Maine

Opinion No. 84-22

July 25, 1984

Patricia E. Ryan
Executive Director
Maine Human Rights Commission
State House Station #51
Augusta, Maine 04333

Dear Ms. Ryan:

This will respond to your letter of April 25, 1984 in which you request an Opinion of this Department as to whether the Maine Human Rights Commission has jurisdiction to investigate complaints of unlawful employment discrimination against the Penobscot Nation.[1] For the reasons discussed below, it is the Opinion of this Department that the employment decisions of the Penobscot Nation, when acting in its capacity as a tribal governmental employer, are not subject to regulation by the State, and, therefore, do not fall within the jurisdiction of the Maine Human Rights Commission.

On November 18, 1983, the Maine Human Rights Commission received a complaint of unlawful employment discrimination against the Penobscot Nation and its Tribal Governor, alleging that the complainant's employment with the Penobscot Nation had been terminated on the basis of her sex in violation of the Maine Human

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[1] For the reasons discussed below, the conclusions reached in this Opinion are equally applicable to the Passamaquoddy Tribe.

Rights Act. (5 M.R.S.A. §§ 4551, et seq.). More particularly, the complainant alleged that she had been employed by the Penobscot Nation as its Director of Employment and was fired from that position, because of her sex, by the Tribal Governor in a decision which was subsequently upheld by the Tribal Council. The Penobscot Nation, through its counsel, has previously stated its position to be that "[c]ivil rights disputes between employees of the tribe and the tribal government are internal tribal matters which are not subject to state regulation. . . . " pursuant to 30 M.R.S.A. § 6206(1).

It is now established that the relationship between the State of Maine and the Penobscot Nation is governed by the provisions of the Maine Indian Claims Settlement Act (30 M.R.S.A. §§ 6201-6214) which has been "approved, ratified, and confirmed" by the United States Congress. 25 U.S.C. §§ 1721(b)(3), 1725(b)(1). See Penobscot Nation v. Stilphen, 461 A.2d 478, 487 (Me. 1983), app. dis. 104 S.Ct. 323 (1983). The legislative findings and declaration of policy which became part of the Maine Act as 30 M.R.S.A. § 6202 recognize that the settlement was designed to resolve "far-reaching claims of various Maine Indians"[2] and "[t]o that end, the Passamaquoddy Tribe and the Penobscot Nation have agreed to adopt the laws of the State as their own to the extent provided in this Act." The general principle that state law will govern the relationship between Maine and the various Indians is more specifically articulated in 30 M.R.S.A. § 6204, which provides:

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[2] Penobscot Nation v. Stiphen, 461 A.2d at 487.

Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the state and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or land or other natural resources therein.

With specific reference to the powers and duties of the Penobscot Nation, 30 M.R.S.A. § 6206(1) provides, in pertinent part:

Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian Territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian Territory, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State. (emphasis added).

In view of the foregoing, it seems apparent that a resolution of the question of whether the Maine Human Rights Commission has jurisdiction to investigate an allegation of unlawful employment discrimination against the Penobscot Nation turns on whether the employment

decisions of the Nation, when acting as a tribal governmental employer, are "internal tribal matters" within the meaning of 30 M.R.S.A. § 6206(1). It is the Opinion of this Department that such decisions are "internal tribal matters" and are, therefore, not subject to regulation by the State of Maine.

In Penobscot Nation v. Stilphen, 461 A.2d 478, 489 (Me. 1983), app. dismissed, 104 S.Ct. 323 (1983), the Maine Law Court held that the term "internal tribal matters" is to be construed by reference to the Maine Indian Settlement Act and its legislative history. In this connection, the Court noted that the term "internal tribal matters" is followed by an illustrative list of the types of matters, including tribal government, which are outside the reach of State regulation. The Court concluded that the term "embraces only those matters illustratively listed in the statute and other matters like them." 461 A.2d at 490. In reviewing the legislative history of the Maine Indian Settlement Acts, the Law Court held that the "internal tribal matters" exception to State jurisdiction was descriptive of those matters having unique cultural and historical importance to the Indians such that they should be free from State control. Id.

It is this Department's Opinion that the authority of the Penobscot Nation to control "tribal government" free of regulation by the State, necessarily includes within it the power to decide who will be an employee of the tribal government. It seems obvious that it is an integral component of tribal self-government to determine who will become an employee within the governmental structure of the Penobscot Nation. The legislative mandate that State regulation is not to extend to matters of tribal

government would become illusory if the Penobscot Nation, when acting in its capacity as a tribal governmental employer, is subject to the jurisdiction of the Maine Human Rights Commission. Subjecting employment decisions of the Penobscot Nation to the jurisdiction of the Maine Human Rights Commission would create a serious potential of State interference with the internal affairs of the tribal government, a result clearly not intended by the Maine Indian Settlement Act. Accordingly, it is the Opinion of this Department that decisions of the Penobscot Nation, as to who will be employed by the tribal government, are "internal tribal matters" not subject to regulation by the State and, therefore, not within the jurisdiction of the Maine Human Rights Commission.[3]

I hope this information is helpful to you, and please feel free to call upon this office if we can be of further assistance.

Sincerely,
James E. Tierney

Attorney General

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[3] This conclusion is consistent with that reached by the Commission itself in a matter entitled Ranco v. Penobscot Nation, E81-0020 (November 15, 1982).